82-1550

Office-Supreme Court, U.S.
FILED
MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IRVIN H. MASON et al.,

Petitioners

v.

PANAMA CANAL COMPANY, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

IRVING STARR
1 Crystal Plaza
(ste 410)
2001 Jefferson
Davis Hwy
Arlington, VA 22202
(703) 521-6636
Attorney for
Petitioner

EDWARD E. WRIGHT
1819 H St., N.W.
(Ste 1175)
Washington, D.C.
20006
Of Counsel

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IRVIN H. MASON et al.,

Petitioners

v.

PANAMA CANAL COMPANY, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

IRVING STARR
1 Crystal Plaza
(ste 410)
2001 Jefferson
Davis Hwy
Arlington, VA 22202
(703) 521-6636
Attorney for
Petitioner

EDWARD E. WRIGHT
1819 H St., N.W.
(Ste 1175)
Washington, D.C.
20006
Of Counsel

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IRVIN H. MASON et al.,

Petitioners,

v.

PANAMA CANAL COMPANY, et al.,

Respondents. */

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment

*/ Additional petitioners are petitioner's wife, Phyllis H. Mason, daughter, Lark D. Mason, and the Mason Engineering Corporation. Additional respondents, all sued in official capacity only, are the Canal Zone Government; and the Stockholder, Board of Directors, and General Officers of the Panama Canal Company.

of the United States Court of Appeals for the District of Columbia Circuit in this case, issued without opinion.

QUESTIONS PRESENTED FOR REVIEW

1. Where a federal employee shows that his removal for alleged job performance reasons occurred shortly after he criticized his superiors for illegal, wasteful, and/or life endangering actions, and that agency officials who accomplished the removal were those directly criticized or subject to their direction, is a presumption of agency regularity constitutionally sound, and what burdens of evidence apply to establish a covert reprisal against First Amendment protected conduct?

2. Where Congress has directed federal agencies in the Canal Zone to establish "written standards" for "determination" of employee "fitness"

and selection of individuals for "transfer" expressly to fulfill Treaty "obligations" assumed by the United States, may an employee of the Panama Canal Company be lawfully denied transfers and discharged for alleged unfitness without reference to any written standards or position exemption simply as a probationary employee?

3. Where a Court of Appeals pursuant to a new practice of disposing of 3/4ths of its cases by summary action affirms the district court without separate opinion, but neither court has addressed serious issues raised on appeal that include failure to follow applicable decisions of this Court, apply Congressional enactments, preserve the right to trial by jury, and assure trial attendance of key witnesses, has a denial of appellate due process occurred justifying exercise of this Court's power of supervision?

TABLE OF CONTENTS

Page

Petition for Writ.....1

Questions Presented.....2

Table of Contents.....3i

Table of Authorities.....3ii

Opinions Below.....4

Jurisdiction of this Court.....4

Constitutional Provisions, Statutes, Regulations Involved.....4

Statement of the Case.....7

Regarding Question 1.....7

Regarding Question 2.....20

Regarding Question 3.....23

Reasons for Granting the Writ.....28

I. To Decide an Important Question Vital to Effective Protection of the Amendment Rights of Federal Employees.....28

II. To Decide An Important Question Affecting Relations Between the United States and the Republic of Panama.....46

Page

III. To Exercise Necessary Supervision Over A Denial of Appellate Due Process...54

Conclusion.....59

Appendix A - Court of Appeals judgment, order.....

Appendix B - District Court findings conclusions, judgment, memorandum opinion, and order..

Appendix C - Constitutional and Treaty Provisions.....

Appendix D - Statutory Provisions...

Appendix E - Rules and Regulations..

Appendix F - Other Materials.....

TABLE OF AUTHORITIES

Page

Cases:

Bivens v. Six Unknown Named Agents, 403 US 388 (1971).....26,28

Borrell v. USICA, 682 F.2d 981 (D.C. Cir. 1982).....41

Bush v. Lucas, No. 81-469 (certiorari issued).....28

Page

Frazier v. MSPB, 672 F.2d 150, (D.C. Cir. 1982).....38

Gardner v. Panama RR Co, 342 US 29 (1962).....25

Givhan v. Western Line Consolidated School District, 439 US 410 (1979).....16,39

Mt. Healthy School District Board v. Doyle, 429 US 274 (1977).....16,39

Panama RR Co. v. Bosse, 249 US 41 (1919).....26

Panama RR Co. v. Johnson, 264 US 375 (1924).....26

Panama RR Co. v. Toppin, 252 US 308 (1920).....26

Porter v. Califano, 592 F.2d 770 (5th Cir. 1979).....42

Taylor v. McKeithen, 407 US 191 (1972).....59

Village of Arlington Heights v. Metrpo. Housing Devd. Co., 429 US 270 (1977).....17

Will v. US, 389 US 90 (1967).....59

Page

Constitutional Provisions:

Article VI.....53
1st Amendment (1 CZC 31(3)).....passim
5th Amendment (1 CZC 31(5)).....passim

Treaties

1955 Treaty between U.S. and Republic of Panama, Memorandum of Understandings, Item 1.....46

Statutes:

Canal Zone Code, various provisions.....passim

PL 85-550, July 25, 1958, implementing 1955 Memorandum of Understandings item 1 with Panama.....46,47

5 U. S. C. 5596, Back Pay Act.....22

5 U. S. C. 2302, 4303, 7701, Civil Service Reform Act of 1978..39

5 U. S. C. 5751, 6322, Court Leave Act.....23

22 U. S. C. 3653, 3781, Panama Canal Act of 1979.....22,52

28 U. S. C. 2680(m), Federal Tort Claims Act.....25

Rules:

F.R.C.P. 37(a)(4) 24

Local Rules, U.S. Ct. of Appeals, D.C. Circuit 8(f), 13(c).....57

Page

Regulations:

Secretary of the Army, 35 C.F.R. §§253.42(c), 253.242.....51

Federal Procurement Regulations, 41 C.F.R. 1-2.304, 2.305, 2.406... 8,E-3

Other:

Civil Service Reform Oversight, 1980 - Whistleblowers: Hearings before House Subcomm., 96th Congress, 2d Sess. (1980)....30,36

Merit Systems Protection Board, WHISTLEBLOWING And The Federal Employee, (October 1981).....31,32,33

Senate Report No. 95-969 of July 10, 1978 [Civil Service Reform Act of 1978], 1978 US Code & Cong. Admin. News 31

Senate Report No. 91-1371 of Nov. 24, 1970 [Court Leave Act], 1970 US Code & Cong. Admin. News 24

House Report No. 96-98, Part I, of April 23, 1979 [Panama Canal Act of 1979], 1979 US Code & Cong. Admin. News.....52

House Report No. 1869, of June 10, 1958 [Treaty of 1955, Understanding No. 1] To Accompany S. 1850 47-50

ABA Judicial Ethics Canon 19.....54

Thurston, "Government Proprie-Tary Corporation," 21 Va. L. Rev. 351 (1935).....26

OPINIONS BELOW

The Court of Appeals' Judgment of Summary affirmance and Order denying rehearing are found in Appendix A hereto. The District Court's Memorandum Opinion of May 11, 1979, and Findings of Fact, Conclusions of Law, and Order of August 24, 1981, adopted by the Court of Appeals by reference, are found in Appendix B hereto. None of these opinions has been published.

JURISDICTION OF THIS COURT

The Court of Appeal's Judgment bears date of, and was entered on, October 20, 1982. Its Order denying rehearing bears date of, and was entered on, December 21, 1982. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions,

treaties, statutes, rules, and regulations, the relevant parts of which are set forth in Appendices, as follows:

Appendix

Article VI, U.S. Constitution.....C

Amendment I, U.S. Constitution (1 CZC 31(3))....C

Amendment V, U.S. Constitution (1 CZC 31(5))....C

Treaty of 1955 between U.S. and Republic of Panama, Memorandum of Understandings, Item No. 1....C

PL 85-550, July 25, 1958, implementing Item No. 1.....C

Canal Zone Code [Vol. 76A Stat. at Large] as follows:
1 CA Code 31.....C
2 CZ Code 61, 143, 149, 155(a)...D
4 CZ Code 1351, 4641, 4701.....D
6 CZ Code 132,.....D

5 U.S.C. 5596, Back Pay Act.....D

5 U.S.C. 2302, 4303, 7701, Civil Service Reform Act of 1978.....D

5 U.S.C. 5751, 6322, Court Leave Act,.....D

22 U.S.C. 3653, 3781, Panama Canal Act of 1979,.....D

28 U.S.C. 2680, Federal Tort Claims Act,.....D

Appendix

Federal Rules Civil Procedure Rule 37(a)(4).....E

Local Rules, U.S. Court of Appeals D.C. Circuit, Rule 8(f), 13(c)...E

Regulations of the Secretary of the Army, 35 C.F.R. 253.42(c), and 253.242,.....E

Federal Procurement Regulations, 41 C.F.R. 1-2.304, 2.305, 2.406,.....E

STATEMENT OF THE CASE

Regarding Question #1. Evidentiary principles and presumptions are widely used which defeat attempts to redress covert denials of the First Amendment rights of federal employees. To understand their application in this case a recapitation of the key facts is necessary.

Petitioner Irvin Mason was a professional engineer with 20 years of experience in estimating when he began as Chief Estimator with the Panama Canal Company in May 1970 in a probationary period as its top choice among a large

field of applicants. On March 22, 1971, despite the fact that Mason's immediate superior Tanassy had never criticized his work, and Mason had received a follow-up official performance rating of "satisfactory," Mason suddenly received a memorandum signed by Tanassy recommending "removal" for non-satisfactory work.

The memorandum contained eight paragraphs of "reasons" which Tanassy admitted in U.S. district court trial held July 7-14, 1981, he had great difficulty putting together. The memorandum contained virtually none of Tanassy's own observations, was shown in draft repeatedly to Tanassy's superior Zelnick then rewritten, and in the end was composed with help from Tanassy's assistant Bierman.

At the end of 1970, beginning of 1971, a series of events occurred

which caused Mason to criticize, in office channels, certain decisions within the Company's Engineering and Construction Bureau as illegal, life-endangering, and wasteful. The decisions were made by Bureau Director Colonel Clark (a full-time Army officer with no professional engineering degree), and Engineering Division Chief Zelnick.

Instances of criticism. In January 1971 a $50,000 increase was awarded to the low-bidder on a Balboa Road contract job at Colonel Clark's direction, approved by Zelnick, based on a claimed "error" in worksheets resubmitted 14 days after bid opening. The error was not found by Mason or any other specialist, and the award was approved by an improper interpretation of Federal Procurement Regulations. Mason, shocked at this procedure, con-

sidered it an invitation to fraud, and commented openly that the procedure was "illegal." --In February 1971 Mason was further shocked to learn that Zelnick intended to proceed with enlargement for drinking water purposes of the raw water intake facility at Paraiso, in the Canal channel, without a formal study of risks and alternatives. A recent ship collision there had called attention to water contamination at this location. The decision posed a serious threat, Mason believed, to the lives of some 500,000 people in the area. Unable to persuade Zelnick to change his mind, Mason prepared a one-page memorandum "For the Record," noting the "risks," and that if alternative "sources" were not "feasible" certain "precautions" could be taken, Appendix F. p. 1. A copy was marked for Zelnick, Clark, and for the Canal Zone Governor (Army Major

General David Parker, President of the Panama Canal Company). Tanassy refused to have the memorandum typed. He said at trial: "No employee that I know of ever wrote anything like this where he criticizes management," TR references, Appellants' CA Brief, p. 12. -- Other incidents at this time included: Mason reporting to Colonel Clark that improvements requested by Clark to his dwelling would greatly exceed the allowable ceiling; Clark informing Mason to "forget" it; but Mason observing the work proceed. A dictum by Zelnick that "all criticism and frivolity" in regard to his widely disliked new Management Information reporting system should cease, but Mason "continued objecting" (Tanassy testimony, id.). And Mason questioning Clark over highly costly and Canal-water-consuming methods authorized by Clark to remove the cargo of a

wreck in the channel, without raising the ship itself.

March 22 Memo. The first paragraph in Tanassy's March 22 memorandum specifically mentioned Mason's objections to the new MIS system, but the Memorandum did not otherwise acknowledge criticism of superiors by Mason as a factor in proposing termination. (See Appendix F p. 9. The final April 26 termination letter repeated Tanassy's first seven reasons, and omitted the eighth.)

Mason promptly called Tanassy's Memorandum "false" and "libelous." After determining that he would not receive a hearing, and that Zelnick and Clark supported removal, Mason requested Governor/President Parker to intervene. On April 23, 1971, having still not heard from Parker, and having by then been repeatedly turned down for transfer

to other positions, Mason sent another letter to Parker, with a copy this time to the Secretary of the Army (Stockholder, Panama Canal Company).

April 23 letter. Mason's second letter (Appendix F, p. 2) supplied detailed information on the Balboa Road, Paraiso, Colonel Clark dwelling, MIS and Sian Yung incidents. They illustrated why Clark and Zelnick, Mason charged, were "bent" on removing him, since they believed, he said, that Mason's "presence represented a threat to the 'status quo'" within their parts of the Company because Mason had "openly questioned the wisdom and/or propriety or prudence of certain policies, practices and deeds within these departments."

In response to Mason's letters General Parker conferred exclusively with Colonel Clark -- by then already in

line to become Canal Zone Lt. Governor -- and approved Mason's termination from all Company employment effective May 1, 1971. */

*/ Thereafter Parker advised Members of Congress, the White House, and the Secretary of the Army that he had conducted a "careful" review of Mason's charges and had determined them to have "no basis," CA Exhibits Vol. 1, p. 84, 86, 90. In early 1972 Secretary of the Army Froelke, Under Secretary BeLieu, and Army General Counsel Berry insisted Parker institute a formal investigation. The Company's Audit Division prepared reports into several subjects, submitting advance draft copies to Parker and Clark. Mason was not interviewed. The officials Mason accused were interviewed and relied on. By direction of Parker the reasons for Mason's termination were not investigated but at Washington request a report was prepared on Company termination procedures. Despite this conspicuous whitewashing effort, the reports substantiated several of Mason's charges and one of the reports revealed that improvements over-ceiling had been made to Clark's dwelling exactly as Mason charged, followed by an elaborate "backing out" of costs, falsification, and destruction of documents. When the Secretary of the Army's office wanted culpability pursued beyond Parker's "admonishment" of Clark, Clark suddenly resigned as Lt. Governor. Except for the Report on termination

Trial evidence. At the trial the Company offered no objective evidence in support of any of the "reasons" given for Mason's termination. **/ The company's "performance" evidence consisted solely of testimony by Tanassy and Bierman, unsupported except by each other. Mason's proof established that over half of the "reasons" were false and the remainder concerned trivial matters, ***/ but the district court found

*/ (con't)...procedures the district court refused to admit the other Reports into evidence, and then found that Mason failed to prove the "truth" of his April 23 allegations(!).

**/ Before trial the Company formally admitted: "no documentary evidence of any kind in Company files...supports, or ever supported...The Tanassy memorandum," record reference, Appellants' CA Brief p. 45. Yet Tanassy memorandum assertions of "unprofessional workpapers," chronic "lateness" in having bid estimates ready, "errors" in the 1973 Capital program, etc., should have been easily verifiable, if true.

***/ False: that Mason's subordinates did not "respect" him (all four

Mason's termination lawful, on the following basis:

First, it did not begin by considering the totality of conduct by Mason to determine what First Amendment-protected conduct occurred that may have been a factor in the removal decision. Instead, it characterized the First Amendment issue before it as limited to whether the evidence supported what it called the "thrust" of Mason's April 23 letter that "he was being terminated to prevent revealing...instances of misfeasance and corruption" Appendix B 16. In consequence, the district court never

***/ (con't)...testified or deposed strongly to the contrary); that Mason "cannot or will not make [MIS] estimates" (this overblown language concerned a single instance of delegation to his senior subordinate); that Mason failed to "review" the Coco Solo estimate and it contained serious errors (the file revealed Mason's usual review, and the most knowledgeable Company employee deposed, without contradiction, that no significant errors were made); etc, etc.

focused on, or specifically found, that First Amendment protected-conduct by Mason in criticizing his superiors was not a "substantial" or "motivating" factor in his termination. */ The district court found that Mason did not establish a "link" between the truth of his charges (as characterized by the district court) and his termination. It is not clear what type of link would have satisfied the court, apart from direct evidence; the record contains multiple indications of an illicit motivational desire being present to suppress Mason's speech and conduct. **/

*/ For the correct procedure as specified by this Court, see: Mt. Healthy School Dist. v. Doyle, 429 US 274, 287 (1977); Givhan v. Western Line Consolidated School Dist, 439 US 410, 415 (1979). Givhan makes clear that the First Amendment protects in-channel criticism of a federal employee's superiors, and Doyle directs a "sensitive inquiry" into motivation

**/ Record evidence: The first reason given by Tanassy specifically refers to

Second, though it should have considered job performance evidence only after first determining on which party. under Doyle and Givhan, supra, the burden of proof rested, the district court began by making job performance findings placing Mason under a "preponderance of the evidence" burden, Appendix B-40, B-9. In so doing the court credited Bierman and Tanassy testimony at face value, without assessing credibility, without considering whether allelged

*/ (con't) Under the principles in Village of Arlington Heights v. Metropol. Housing Corp, 429 US 252, 270-271 (1977).

**/ (con't) ...Mason's objections to the MIS procedure as a basis for removal. Tanassy admitted at trial Zelnick resented Mason's criticism of this system, that he prepared the removal memorandum under Zelnick's close direction, and that Mason's proposed Paraiso memo criticizing Zelnick was unprecedented. Within three days of Mason's April 23 letter arriving in Parker's office Mason was terminated from the Company. Parker approved after conferring with Clark, calling the termination Clark's proposal. A personnel memorandum explaining why transfer assistance was not given to Mason refers to Mason's "attitude problem."

faults in Mason's performance were substantial or trivial, */ whether various asserted duties had ever been explained to him, **/ or reflecting on its own limited findings that left suspiciously unproven, or false, major remaining parts of the March 22 Memorandum. On this thin basis, the district court found Mason "did not per form in a satisfactory manner" and the Company's evaluation "honestly" made, Appendix B-9, B-21.

*/ Trivial: Mason on a single occasion delegated MIS duties to his senior subordinate; the 1973 Capital Program contained "errors" never identified; Mason was not deeply familiar with the Coco Solo project but it was one of 80 in his shop per year and had been long handled by others. Bierman testified he had "no objection" to Mason's termination, but never recommended it.

**/ For Mason to always make individual assignments or do any fixed percentage of the estimates, all Tanassy had to do was tell him, but he did this for the first time on March 22.

Requested, inter alia, to reverse and remand for determinations in keeping with Doyle, the Court of Appeals approved the district court's reasoning in its summary affirmance on October 20, 1982, and subsequently denied rehearing.

Presumptions. In urging that this Court consider the correctness of basic evidentiary principles and presumptions applicable to cases of possible covert denial of First Amendment rights of federal employees, petitioners deliberately urge more than the need to correct the analytica errors committed in this particularly case. If the First Amendment rights contained in Doyle and Givhan are to be made meaningful, this Court must take note that actions for redress by whistleblowers and conscientious federal employees against covert reprisals have rarely succeeded, in large part because

of unrealistic and crushing burdens of proof. At bottom, as a principal cause, is an unsound adherence to a broad, illogical presumption of regularity in agency decision-making which has no justification in this category of cases. Petitioners urge this Court to consider and lay down evidentiary rules and presumptions based on logic and experience which will protect First Amendment rights more appropriately, and serve important public policy objectives.

Regarding Question #2. Title 2, Section 143 of the Canal Zone Code states that Canal Zone agencies "shall establish written standards for the (1) determination of the qualifications and fitness of employees...; and (2) selection of individuals for...transfer to positions."

At trial in July 1981 the Company's personnel expert Rodriguez

admitted that he was unaware of any "written standards" in force by the Company applicable to transfer requests which could explain Mason's nonselection after March 22, 1971, for transfer to seven other positions, some of which he was admittedly qualified for. Likewise neither Tanassy nor Bierman were aware of any "written standards" established to determine fitness in Mason's position, and both admitted not utilizing any such standards or any other document in preparing the March 22 memorandum. Appellants' CA Brief, p. 31, 40.

The requirement found in 2 CZC 143 rests on legislation adopted by Congress in 1958 as expressly necessary to fulfill United States Treaty obligations assumed in a 1955 Treaty between the United States and the Republic of Panama intended, inter alia, to curb arbitrary personnel actions by US agencies in the Canal Zone.

Neither Court below has seen fit to address the serious issue whether the Company's termination and non-transfer of Mason without ever complying with Section 143 Treaty obligations were "unwarranted" personnel actions within the meaning of the Back Pay Act. To the extent any implied disposition of this question can be found, it must rest on district court citation of Canal Zone Merit System regulations issued by the Secretary of the Army for "Fitness" determinations of probationary employees. But these regulations do not excuse issuance of written standards for the position Mason occupied, which would be relevant to determining the fitness of any incumbent.

The contents of 2 CZC 143 were reenacted in the Panama Canal Act of 1979, and are still in force today. This issue affects the employment,

retention, and transfer rights of thousands of American and Panamanian workers in the former Canal Zone, and the integrity of the United States observance of treaty obligations.

Regarding Question #3. In petitioning for rehearing before the Court of Appeals petitioners emphasized that the two district court opinions adopted in the Court of Appeals' judgment of summary affirmance failed entirely to address certain serious questions raised on appeal. In addition to Questions #1 and #2 herein, five other major issues were not confronted by either court below.

Unaddressed issues include: District court failure to use statutory authority under 5 U.S.C. 5751 and 6322 (The Court Leave Act) to summon key Canal Zone agency personnel requested as

witnesses. */ And failure to consider whether a "fair" probationary trial occurred in view of the district court's finding that Tanassy never counseled or criticized Mason's job performance prior to recommending removal. **/

A major pre-trial issue raised and not addressed was the district court's failure to enforce the mandatory provision in Rule 37(a)(4), Federal Rules of Civil Procedure, imposing costs and attorneys fees for wrongful resistance to discovery demands.

*/ Personnel the district judge agreed were important to the trial and said it would summon if "I could get them here;" Appellants' CA Brief p.60. The legislative history of this Act (1970 US Code & Cong. Admin. News, p. 5015-5019) indicates such authority exists. The Act has never been judicially interpreted.

**/ Various Federal Personnel Manual provisions require a minimum of appropriate counseling.

Fourth, the district court's dismissal of petitioners' major tort claims on May 11, 1979, Appendix B-43 ff, was entered without considering the long-established liability of the Panama Canal Company and its direct corporate predecessor for torts committed by its officers and agents, resting on 60 years of decisions by this Court, a liability expressly approved by Congress in exempting the Company from the Federal Tort Claims Act, and reinforced in by Canal Zone Code provisions. */ The district court placed reliance on a simplistic observation that since no individual officials had been served the tort claims in Counts II and III were

*/ The Company's intentional exemption by Congress from all provisions of the Federal Tort Claims Act (at 28 U.S.C. 2680(m), Appendix D) was explained by this Court in Gardner v. Panama RR Co. 342 US 29, 32 (1951). The President of its immediate corporate predecesor urged Congress to continue the Company's broad tort liability "unimpaired."

not sustainable under Bivens v. Six Unknown Agents, 403 US 388 (1971), Appendix B-52, B-56. But unconsidered was that this unusual federal agency was suable in tort under respondeat-superior principles 50 years before Bivens. */

Lastly, the district court impliedly denied to petitioners constitutional rights to trial by jury of their tort claims, rights resting on the same 60-year body of Panama Canal Company jurisprudence. **/

*/ Panama RR Co. v. Bosse, 249 US 41 (1919); Panama RR Co. v. Toppin, 252 US 308 (1920); Panama RR Co. v. Johnson, 264 US 375 (1975). The Company's US Government ownership was held irrelevant because of its commercial character. Congress continued the Panama Canal Co's full liability in tort for the same reason. The district court's mischaracterization of factual allegations in its Count II dismissal, and an asserted reliance by plaintiffs on criminal Canal Zone Code sections in its Count III dismissal would not withstand a careful review.

**/ See cases in preceding footnote and Thurston, "Government Proprietary Corporation," 21 Va. L. Rev. 351, 378-379 (1935).

These serious arguments disregarded by the Court of Appeals are not ones that can be lawfully suitably brushed aside in a summary affirmance. To disregard serious issues on appeal that assert district court noncompliance with decisions of this Court and Acts of Congress is to deny appellate due process.

While relief suitable to this case might take the form of a reversal and remand with instructions, petitioners believe that the denial of appellate due process revealed in this case has become a serious general problem. In the D.C. and Second Circuits approximately three out of every four appeals at this time are now being disposed of summarily, under no clear statutory or rule authorization for such conduct, and with no protection against arbitrary behavior. This is an abrupt departure

from the accepted and usual course of judicial proceedings which warrants an exercise of this Court's supervisory authority to forstall a general abuse of summary affirmance power.

REASONS FOR ISSUING WRIT

I TO SETTLE AN IMPORTANT QUESTION VITAL TO EFFECTIVE PROTECTION OF THE FIRST AMENDMENT RIGHTS OF FEDERAL EMPLOYEES

This Court recently granted certiorari in Bush v. Lucas, No. 81-469, to consider the question whether a federal employee's redress for violations of First Amendment rights is limited to remedies Congress has provided or include tort actions against individual agency officials under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and related cases. While the full extent of redress for trampled federal employee First Amendment rights is important, it is

less important than the issue here raised which controls pragmatically in most instances whether any redress at all can be obtained.

The vast majority of federal agency whistleblowers and conscientious-civil-servant-critics never obtain redress against reprisal actions. */ They fail because reprisals are usually covertly taken, and the legal path to redress is cluttered with enormous obstacles. **/

*/ The term "whistleblower" is widely used to include both categories of First Amendment-protected conduct, and is so used herein, but blurs an important distinction. While the "whistleblower" calls public or upper level executive attention to illegality, mismanagment, or waste, the "conscientious critic" tries to persuade superiors in-shop to change. As with many whistleblowers, Mason began conscientiously in-shop.

**/ Agency personnel hestitate to support charges against higher ranking officials and thus jeopardize their own careers; witnesses are hard to find. Relevant documentary evidence is in the control of agency officials; obtaining

Of central impact is the ease with which improper agency motivation can be hidden, combined with the prohibitive cost and difficulty of overcoming tilted agency-favoring presumptions usually applied in trial proceedings, as this case illustrates. The Constitutional validity of these presumptions, their choking consequences for First Amendment rights, and their gravely deleterious effect on the public interest in suppressing disclosures of federal

---

**/ (con't)...it, and avoiding destruction, will be difficult. Agency officials have all legal services provided to them, while few civil servants can afford the cost of serious litigation. (In testimony before the House Subcommittee on the Civil Service during hearings on "Civil Service Reform Oversight, 1980--Whistleblowers," Ernest Fitzgerald stated "$800,000 has been expended in my defense," Hearings, p. 142. Other whistleblowers testifying spoke of "$40-50,000" in legal fees, not to mention heavy damages. In this case legal expenses by any normal measurement have exceeded $200,000.)

agency waste, mismanagement, and illegal conduct have not been considered heretofore by this Court. It is appropriate for the Court to give this urgent matter its full consideration.

In its Report recommending adoption of the Civil Service Reform Act of 1978, the Senate Committee on Governmental Affairs noted:

> "Often the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss." (Senate Report No. 95-969 of July 10, 1978; 1978 U.S. Code Cong. & Admin. News p. 2723, 2730.)

Just how often has been revealed partially in a carefully conducted survey of 13,000 federal workers in 15 different agencies by an office of the Merit Systems Protection Board. In a Report issued October 1981, */ of

*/ "WHISTLEBLOWING and the Federal Employee," Oct 1981, Report of USMSPB Office of Merit Systems Review and Studies.

the employees responding who indicated that had reported a "serious" (defined as involving $1,000 or more in funds or property) instance of illegal or wasteful activities in their agency and had been identified, 34% believed they had suffered a "negative experience" as a result, Report p. 34. A quarter of the 34% reported that reprisals were taken against them, generally without warning. In these cases 56% of the reprisal victims said that their immediate supervisor was at least one of the sources of the reprisal, and 39% reported that the second-level supervisor was involved. The reporters indicated that reprisals were usually subtly taken, with a "poor performance rating" being the most common form (40% of the cases). */ Among

*/ Report p. 3: "The most frequently cited forms of reprisal were...subjective, discretionary actions, such as poor performance appraisal, assignment of less desirable...duties, and denial of promotion."

those who reported receiving reprisal action, "action was taken to compensate the affected employee for the reprisal action in only 7% of the cases," Report p. 37, emp. sup.

The widespread occurrence of reprisal, even where the mismanagement or waste reported is not grave, and the statistics on redress shed a powerful light on other important findings in the study affecting the public interest. The 1981 study found that 45% of all employees surveyed claimed to have observed one or more instances of illegal or wasteful activity during the previous 12 months, half involving more than $1,000 in funds or property, and one in 10 involving over $100,000. */

*/ The Report, p. 1 said: "A recent GAO Report, Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled? (May 7, 1981), estimated the loss to the Federal Government from known fraud totaled between $150 million to $220 million. GAO maintains that 'this is probably just the tip of

But 70% of these failed to report the misconduct in any form at all.

The non-reporters gave principally one of two grounds: 53% said nothing would be done anyway, while 19% cited a fear of reprisal as the reason, Report p. 1-2. But asked if they felt "confident" that their immediate supervisor would not take reprisal action if they were to report an illegal or wasteful activity through official channels, 43% expressed lack of confidence and 13% were not sure, while 59% expressed a

*/ (con't.) the iceberg.' Similarly, former Atty General Benjamin Civiletti once estimated that 'as much as 10% of the budgets of some Federal agencies is either wasted, misdirected, or stolen' (see "The Government vs. Itself," Newsweek, April 27, 1981, pp. 73-74)." The agency's preliminary report in April 1981 concluded, p. 6: "The present survey...indicates that the Federal Government has hardly scratched the surface in tapping the collective observations which employees could bring to bear in eliminating fraud, waste, and mismanagement in Government operations."

lack of confidence that a higher level supervisor would not take reprisal action and 18% more were not sure, Report p. 44. Thus, concern over reprisal may actually be the dominant reason.

If the large body of employee knowledge of illegal or wasteful activity is to be unlocked, then a necessary key lies in curbing the widespread concern over reprisal actions. But this can be accomplished only if an underlying reason for concern, the dismal record of employee redress against reprisals, is diminished.

A heralded objective behind certain provisions inserted by Congress in the Civil Service Reform Act of 1978 was to create administrative machinery that would protect whistleblowers. Abundant preliminary indications are that this special administrative machinery is not

working. */ A major reason for its failure relates to legal and evidentiary presumptions that have already affected whistleblower cases before the MSPB, as they have affected the present case, and which will continue to render success unlikely in suits for covert violation of whistle-blower rights, whether arising under or outside the 1978 Act, unless changed by this Court.

These presumptions, often not consciously stated, but applied, are as

*/ In the 1980 House Oversight hearings (ft. p. 30) nearly all witnesses agreed that no increase in the level of protection to whistleblowers has occurred since the 1978 Act. A principal proponent of the 1978 Act introduced legislation in 1982 to abolish the Office of MSPB Special Counsel, see H.R. 6392, 97th Cong., 2nd Sess., 128 Cong. Rec. 2271, (daily ed. May 17, 1982) (Cong. Schroeder). While the Office of Special Counsel has achieved some protection for whistleblowers in non-litigated cases, as of late 1982 it had not yet won a case before the board "establishing that a whistleblower's rights have been violated," 62 Amer. Bar Ass. J. 1965 (Sept 1982), nor filed a disciplinary action case.

follows:

(1) that an agency superior who has been criticized either publicly or privately for illegality, waste, or mismanagement by a subordinate is entitled to a presumption that an adverse personnel action taken against the subordinate by him directly, or by an official under his direction, whenever it occurs, is legal until proven otherwise by other evidence.

And (2) that purely subjective testimony on aspects of the subordinate's work by the criticized official, or by an agency official under his direction, constitutes substantial evidence, even if objective verification is not provided, and one or more reasons used to explain the action is shown to be false or trivial.

In short, a broad presumption of agency regularity places proof bur-

dens on the whistleblower to establish improper agency motivation to curb his First Amendment rights by depriving him, at the outset, of powerful common-sense arguments.

These presumptions were applied extremely in the present case. */ The first has been applied in an important MSPB 1978 Act case. **/ They

*/ Through the district court's apparent belief that illicit motivation could be established only through a high standard of direct "linkage" evidence; its disregard or non-weighing of all performance evidence other than the Company's; and by the Court of Appeals' summary affirmance.

**/ Frazier v. MSPB, CADC 1982, 672 F.2d 150, 164-165 ("[W]e must sustain the Board's choice [of which party bears the burden of proof] if it is consistent with the statutory scheme and reasonable . . .[O]fficial regularity in...regard [to prohibited personnel practices may] be presumed..." (held: Board's ruling that knowledge of employee First Amendment-protected conduct by top-ranking agency official had to be proven, despite knowledge by other officials, and that Office of Special Counsel support for claimants did not shift burden of proof, affirmed).

will continue to defeat covert reprisal claimants in the future, as matters now stand. */

While this Court has said that a claimant to First Amendment protection must "show" that his protected activities were a "substantial" or "motivating" factor in the agency's decision he challenges, and that a "sensitive inquiry" into motivation and job performance must be conducted, **/ it has left

*/ For other reasons, the 1978 Act deliberately made it easier to remove federal employees whose performance is "unacceptable," 5 U.S.C. 4303, Appendix D, p. 10. A determination to this effect by the head of the agency alone, or by the employee's superior and a higher level superior, need only be "supported by substantial evidence" to be sustained, 5 U.S.C. 4303, 7701 (Appendix D, p. 11,14). These provisions have placed conscientious career civil servants on virtually the same exposed legal footing as Mr. Mason.

**/ Mt. Healthy School Dist. v. Doyle, 429 US 274 (1977); Givhan v. Western Line Consolidated School District, 439 US 410 (1979).

evidentiary rules and principles for determining this otherwise to the lower courts. What has happened is that in covert denial cases is that destructive presumptions have been applied that have denied the force of commonsense, have imposed the task of "proving" motivation/ when it can be easily hidden or obscured and of disproving agency performance testimony. This is easy to fabricate. If the extensive evidence assembled in this case, with great difficulty, */ is not sufficient to "show" that an illicit motivation to repress Mason's First Amendment activities was present, (see pages 6-19 supra), to shift the burden of proof on job performance to the agency, and to prevail, then there is no hope for at least 9 out of 10 covert denial claimants.

*/ The petitioners had to brought over a dozen Freedom of Information Act proceedings to secure relevant information.

It would be possible for the Court to achieve more "sensitive" inquiries below perhaps by specifing evidentiary elements to be considered and weighed in the future. */ This might be helpful. But an overriding fact is that suits for redress by federal claimants covertly denied First Amendment rights are enormously unequal contests, and will remain so, so long as a presumption of agency regularity is applied.

On analysis, a presumption of agency regularity in these cases is without a logical and sound basis, is neither constitutionally required nor appropriate, is unduly destructive of constitutional rights and harmful to public policy.

---

*/ Faced with conclusory findings only in the whistleblower case of Borrell v. USICA, 682 F.2d 989, 991-2, (D.C. Cir, 1982), the Court of Appeals remanded for detailed compliance with Rule 52(a).

The presumption is illogical for the following reasons: an official criticized and accused by a subordinate of serious misconduct or mismanagement is hardly likely to act objectively and dispassionately in personnel matters regarding the subordinate thereafter. To presume that he has done so is to fly in the face of general human knowledge and experience, an experience reflected and confirmed in the widely held beliefs of government employees toward their superiors reported in the 1981 MSPB study. The presumption, moreover, ignores a general rule of law that decisions by interested parties are "tainted," and not entitled to a presumption of validity. */

The facts and reasoning of the Fifth Circuit in Porter v. Califano, 592 F.2d 770, (5th Cir. 1979), a

*/ For this reason, of course, judges are subject to recusal.

whistleblower case, are illuminating in this regard. Because the personnel decision was "tainted," the court concluded all issues should be tried de novo in district court free of a mistaken "extremely deferential standard of review," p. 772, 782-83.

Where accusations involve illegal conduct, gross mismanagement, or life-endangering decisions, a stronger basis for personal bias and prejudice on the part of the decision-maker would be difficult to imagine. Human experience, logic, and the same general rule of law do not differentiate where the decision-maker is a person subject to direction by an official accused of misconduct.

The Constitution does not require illogical and unsound legal presumptions. And it is clear that these presumptions, as in the present case, have operated to make redress extremely dif-

ficult against covert First Amendment violations. The consequence has been to chill First Amendment rights and to repress disclosure of information possessed by government employees of extensive waste, mismanagement, fraud, and illegality in government operations. Adequate protection to constitutional rights and considerations of public interest demand that unsound presumptions in this area should be replaced with more appropriate ones.

A <u>better</u> presumption for federal courts and administrative agencies is that agency action removing, demoting, or seriously affecting an employee who has criticized an agency superior in a manner likely to bias that official's judgment is "tainted" if taken, ordered, or approved by an official so criticized or by another person subject to his direction. A presumption of regularity should attach only to

personnel decisions made by a process in which the decision-makers are likely to be objective and impartial. In the absence of affording an objective and impartial agency decision-making process, a presumption of irregularity should attach to such decisions. Until corrected by an impartial agency decision-making process, the agency should thereafter have to bear the burden of proof by a preponderance of the evidence in any subsequent proceeding in which its initial action has been challenged.

These corrected presumptions, which are logical, sound, and appropriate, will give urgently needed protection to First Amendment rights and serve the public interest by making it possible for employees to increase the effectiveness of their agencies by speaking out.

II To Decide An Important Question Affecting Relations Between the United States and the Republic of Panama

Item 1 of the Memorandum of Understandings attached to the 1955 Treaty between the United States and the Republic of Panama committed the United States to establish certain uniform and non-discriminatory wage and employment practices by U.S. agencies in the Canal Zone [Treaties of U.S., Vol. 6, Part 2, 1955, Treaty of January 25, 1955, p. 2273 ff, Memorandum at p. 2330; see pertinent portion in Appendix D hereof p. D-5]. Since various executive agencies had been slow in implementing item 1, Congress in 1958 enacted PL 85-550 [Appendix D hereof]. The Act contained an express finding in Section 1(c) that:

> "enactment of legislation containing a statement of general policies and principles and other provisions in implementation of item 1 of such Memorandum of Understandings is necessary to the faithful and proper discharge of the

> obligations assumed by the Government of the United States under such item." (Appendix D-5)

One of the Act's provisions was Section 4(a) which required the head of each U.S. Government agency with operations in the Canal Zone to:

> "establish written standards, in conformity with this Act, the regulations promulgated under section 15(b) of this Act and the Canal Zone Merit System established under section 10 of this Act, for--
> (1) the determination of the qualifications and fitness of employees and of individuals under consideration for appointment to positions, and
> (2) the selection of individuals for appointment, promotion, or transfer to positions." emp. sup. (Appendix D-7, incorporated in CZ Code as 2 CZ Code 143).

House Report 1869 of June 10, 1958, reveals that the express finding in §1(2) that the Act was "necessary" to fulfill Treaty obligations was highly intentional. The Report said that:

> "[f]ormal recognition by the Congress of item 1 and the obligations contained therein...is

> necessary as an aid to the maintenance of the reputation of the United States Government for reliability and good faith in the conduct of its foreign relations. The recognition and implementation of item 1 of the proposed legislation again demonstrates that the United States Government will keep its word and honor its commitments." (p. 4, Report of House Committee on Post Office and Civil Service)

A section entitled "Existing Employment Conditions In the Canal Zone" in House Report 1869 makes clear that PL 85-550 was intended to remedy a situation of discrimination and arbitrariness in employment conditions in the Canal Zone of a very extensive nature. The Report states:

> "...there are in the Canal Zone approximately 22,000 employees of the United States Government. Of these...14,000 [are] citizens of the Republic of Panama...
>
> "At the present time, there are almost as many position-classification and evaluation standards and rates of basic compensation for these positions...as there are positions themselves...

> "This inequality of, and lack of uniformity in, the application and operation of employment and personnel rules, regulations, standards, and procedures generally is evidenced also in conditions of employment other than classification, evaluation and pay... [D]iscrimination in employment exists in varying degrees. This situation has resulted in ill will, lower morale, and a general lack of a sense of well-being among the employees concerned as well as a deterioration of relations between the Government of the United States and the Government of the Republic of Panama." (p. 6-7) (emp. sup.)

To redress this "unsatisfactory situation" "three remedial steps" were required, the House Committee said:

> "The first step is the assumption by the United States under item 1 of the memorandum of understandings of certain definite and specific obligations...in connection with the Canal Zone employment problems described above.
>
> "The second step is the enactment of appropriate legislation... to implement the provisions of item 1 by providing specific authority, principles, standards, procedures, and other provisions which will facilitate the discharge of the obligations assumed by the United States under item 1.

> "The third step is [for] the executive branch...to carry out the provisions ..." (p. 7)

At the U.S. District Court trial herein held July 7-14, 1981, it became apparent from the testimony of witnesses for the Panama Canal Company that no witness could point to any Panama Canal Company implementation of Section 4(a) of PL 85-550 "establishing" "written standards" for determining fitness in Mason's position or regulating transfer selections among qualified candidates.

In consequence, the trial revealed not only that Mr. Mason had been refused transfers and determined unfit without use of any written standards to guide these major personnel actions, but it revealed a general status of continued Company arbitrariness in major personnel actions which Congress in 1958 specifically

directed Canal Zone agencies to correct. Neither court below has attempted to justify Company failure to observe §4(a) of the 1958 Act, and no justification is apparent. */

The issue of applicability of 2 CZ Code 143 [§4(a) of the 1958 Act] to Mr. Mason's termination in 1971 is not an issue narrowly confined in its impact, but has wide and serious ramifications.

*/ That Mason was serving a Canal Zone Merit System 1-year probationary period under regulations issued by the Secretary of the Army (at 35 CFR 253.242; as Presidential delegee) does not excuse non-issuance of written standards for determining fitness for the position Mason occupied as Chief Estimator. Even if Mason's procedural rights were less than for a tenured employee the reasons given for removal should have referred to the written standards for fitness in the position he occupied. "Fitness" is exactly what a probationary employee's trial period is supposed to determine (see Appendix B-28; CZ Merit System regs at 35 C.F.R. 253.42(c), Appendix E, p. 2). No exclusion of Mason's position from §4(a) has occurred. His transfer applications should also have been governed by suitable written standards.

In the Panama Canal Act of 1979 [93 Stat. 452ff], Congress recently renewed the provisions of 2 CZ Code 143 without major change, making them applicable to the newly created Panama Canal Commission (see 22 U.S.C. 3653, Appendix D-15). House Report 96-98, Part I, of April 23, 1979 (1979 U.S. Code & Cong. Admin. News, p. 1034ff) specifies that the statutory language was "enacted in 1958 to carry into effect certain provisions of the 1955 treaty with Panama" (id., p. 1055), and that the 1979 Act "reenacts...2 CZ Code 143, requiring written standards for determination of qualifications and fitness of employees and applicants, and selection of individuals for appointment, promotion, or transfer" (id, p. 1056).

There are thousands of American, and greater thousands of Panamanian, employees whose employment

opportunities, retention rights and job improvement efforts will be denied significant protection against arbitrary and discriminatory personnel acts if the rationale used by the lower courts in this case -- which has been to treat §4(a) of the 1958 Act as non-existent -- is allowed to go uncorrected. The judicial branch cannot become a party to U.S. agency failure to carry out specific United States Treaty obligations identified and imposed by Congress without serious consequences for international relations and United States Government integrity.

This Court should therefore either reverse and remand with instructions, or take up the applicability of §4(a), essentially a question of law, for direct consideration.

III. To Exercise Necessary Supervision Over A Denial of Appellate Due Process

The serious nature of seven arguments raised by petitioners in the Court of Appeals, but not addressed by that court, has been explained on pages 23-26 supra.

Canon 19 of the American Bar Association's Canons of Judicial Ethics states in part:

> "In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus...avoids the suspicion of arbitrary conclusion..." (emp. sup.)

The usual and accepted practice of U.S. appellate courts has long been to issue written opinions accompanying their decisions. This practice not only avoids a "suspicion of arbitrary conclusion," but by assuring that the court's reasons for decision are articu-

lated, also tends to avoid an arbitrary disposition in fact that would deny litigants their entitlement to a careful review of errors raised on appeal. Since a right of appeal from a final decision of a U.S. district court lies only to the U.S. Circuit Court of Appeals for that district, 28 U.S.C. 1291, 1294, and no further right of appeal exists for a litigant in federal court, it is essential that the one-time-only disposition of an appeal by a U.S. Court of Appeals accord due process to litigants. Petitioners believe that a clear denial of appellate due process has occurred in this case through the Court of Appeals' hasty adoption of decisions by the trial court, and its resulting failure to address serious arguments of counsel on appeal.

Statistical evidence compiled by counsel reveals that in the space of

a few years' time a previously prevailing Court of Appeals practice of writing opinions in each case, or in the vast majority of cases, has now shifted to making summary dispositions. Currently, in the D.C. and Second Circuits dispositions without written opinion are now occurring in three out of every four cases. */

*/ Cases handled without opinion are listed in Federal Reporter 2nd Series volumes by table. In 1973 in Fed. 2d Volumes 471 thru 473 the D.C. Circuit disposed of all 53 cases reported by an opinion in each case. In these volumes the Second Circuit handled 78 cases by opinion, 53 cases without opinion, or 40.5% with no opinion. In 1982 in Volumes 671 thru 673, the D.C. Circuit reported 55 cases with opinion, 148 cases without opinion, or 72.9% with no opinion. The Second Circuit in the same period reported 53 cases with opinion, 148 without opinion, or 73.6% with no opinion. These volumes were chosen at random. Statistical information is said to be not available by the Clerk's office of the D.C. Circuit and by the Administrative Office of U.S. Courts. Statistics for other Circuits have not been compiled by counsel.

This departure from a usual and accepted practice of longstanding and of sound nature has not been authorized. */ The new practice is not presently subject to any system of control that would help to assure against arbitrary denials of appellate due process. Yet the very volume of summary dispositions now occurring is suspect. It is not likely that counsel are raising non-serious arguments in 3 out of 4 cases. A statistical inference exists that denials of appellate due process are widespread and growing.

*/ The Court of Appeals' judgment herein cites local Rule 13(c). This non-recent Rule is addressed to situations "where the issues occasion no need" for an opinion. But footnote references cited in the Rule do not authorize wholesale abandonment of opinion-writing. Indeed, ABA Judicial Ethics Canon 19 is specifically mentioned. The 1964 Judicial Conference resolution cited deals with keeping opinions authorized for publication "succinct," an altogether different question; and local Rule 8(f) states unpublished orders or memoranda are not to be used as precedents, also a different question.

In an era in which legal issues at the U.S. district court trial level are increasingly numerous and complex, while the capacity of the U.S. Supreme Court to take a significant percentage of petitions for Certiorari is sharply contracting, if a review of serious legal issues cannot be obtained at the Court of Appeals level, then a serious crisis in the quality of justice is present. Investing trial judges with an enormously expanded power to conduct cases without likelihood of correction will undermine justice. Maintaining the integrity of appellate review is essential, or our entire system of effective justice is threatened.

Petitioners' counsel have no easy solutions to offer to what is undoubtedly a complex problem. But allowing Courts of Appeals an unbridled

license to dispose of an ever growing majority of cases by summary disposition cannot be the answer.

Where Courts of Appeals have failed to render written opinions on the merits of issues before them, this Court has in the past reversed and remanded with instructions; see, e.g., Taylor v. McKeithen, 407 U.S. 191, 194 (1972); Will v. U.S., 389 U.S. 90 (1967) Such minimum relief is called for here. But where a major departure has occurred from usual and accepted practices that threaten the integrity of appellate due process, the Supreme Court should consider also whether general remedial measures are needed under its supervisory responsibility for the U.S. court system.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue

to review the October 20, 1982, judgment, and December 21, 1982, order denying rehearing of the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted

IRVING STARR
1 Crystal Plaza, Suite 410
2001 Jefferson Davis Hwy
Arlington, Virginia 22202
(703) 521-6636
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that 3 copies of the foregoing Petition for WRIT of Certiorari have been served on respondents by delivery to their counsel of record below, John W. Polk, Esq., Assistant U.S. Attorney, U.S. Courthouse, Room 2800, Constitution Avenue and 3rd Street, N.W., Washington, D.C., , on the 21st day of March, 1983, and that 3 copies have been mailed first class, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, on the 21st day of March, 1983.

IRVING STARR
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-2231 Sept. Term, 1982

Irvin H. Mason, et al.
Appellants

Civil Action No. 74-00872

v.

Panama Canal Company/
Government Stockholder,
et al.

Filed Dec. 21, 1982

ARGUED 10-14-82

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

O R D E R

Appellants' suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc

that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-2231 Sept. Term, 1982

Irvin H. Mason, et al. Civil Action No.
Appellants 74-00872

v.

Panama Canal Company/ Filed Oct. 20,
Government Stockholder, 1982
et al.

ARGUED 10-14-82

Appeal from the United States
District Court
for the District of Columbia

Before ROBINSON, Chief Judge, TAMM, Circuit Judge, and LUMBARD,* Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

---

*Of the United States Court of Appeals for the Second Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the judgment of the District Court appealed from in this cause be and hereby is affirmed for the reasons articulated in its Memorandum Opinion and Order, filed May 11, 1979, and on the basis of its Findings of Fact, Conclusions of Law and Order, filed August 24, 1981.

It is further ORDERED that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

George A. Fisher
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al., Plaintiffs, v. PANAMA CANAL COMMISSION et al., Defendants.	)	Civil Action No. 74-872
	)	Filed Aug 24, 1981

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiffs filed this action against the Panama Canal Company and the Canal Zone Government alleging (1) that Mr. Mason had been subjected to an unjustified personnel action within the meaning of the Back Pay Act, 5 U.S.C. §5596, (2) that defendants breached an implied contract of employment by terminating Mason's employment, and (3) that defendants damaged plaintiffs' household goods --

mainly because defendants stored the property in a storage facility which was not air conditioned.

2. The Panama Canal Company was created by Congress by a statute providing that "[f]or the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation to the civil government of the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, a body corporate to be known as the Panama Canal Company. . . ." Act of Sept. 26, 1950, 64 Stat. 1038, 1041 [Emphasis supplied.] (As a result of the recent Panama Canal Treaty there is no longer a Canal Zone and the Panama Canal Company has been dissolved. See 22 U.S.C. §3602(b)) (1976).

3. One of the sub-divisions of the Company was the Engineering and Construction Bureau. In 1970-71, the

Director of this Bureau was Colonel Charles R. Clark. This Bureau contained several divisions, one of which was the Engineering Division. In 1970-71, the chief of this division was Ernest W. Zelnick. The Engineering Divsion, in turn, was divided into branches, one of which was designated the Specifications and Estimates Branch. In 1970-71, the chief of this branch was Louis J. Tanassy and the assistant chief was Melvin Bierman.

The Specifications and Estimates Branch had two sections: the Specifications Section was responsible for writing, reviewing, and revising specifications for construction, maintenance, and demolition projects; the Estimates Section was responsible for preparing preliminary and final estimates for similar projects.

4. For several years prior to January, 1970, the head of the Estimates

Section was John W. Muller. In that position Muller supervised three to four estimators. Muller supervised the other estimators, and did a significant share of estimating himself, often personally handling the more difficult and complicated projects. Both Tanassy and Bierman thought that Muller was an extremely capable estimator and supervisor, who discharged his duties in a highly satisfactory way, and they relied heavily on him for the technical supervision of the other estimators.

5. Early in 1970, Mr. Muller retired from his position as chief estimator. Although Tanassy and Bierman each had some knowledge of estimating, and Tanassy had actually done some estimating, neither Tanassy nor Bierman was an estimator per se, and both felt that it was necessary to fill Muller's vacant position with a reliable chief estimator.

6. The Company advertised for a chief estimator, and Mr. Mason submitted an application. At that time Mason was living with his wife and daughter in Virginia. A hiring committee for the Company -- of which Tanassy was a member -- reviewed the applications received in response to the advertisement, and decided to interview Mr. Mason. In the Spring of 1971, he travelled to Panama, where he met with representatives of the Company, including Tanassy and Bierman. Although Tanassy personally preferred to promote one of the estimators working in the Estimates Section, the rest of the hiring committee favored hiring someone from outside the Company. The committee generally was impressed with Mr. Mason's credentials and decided to hire him.

7. On April 20, 1970, Mr. Mason was given a temporary appointment to the position of supervisory general

engineer (estimator) NM-12. (See Plaintiff's Exhibit [hereinafter "PX)] 5.) This appointment actually became effective on May 29, 1970. (See PX 46). Because the Panama Canal Company was "an agency and instrumentality of the United States," its employees were also employees of the United States. (Testimony of Julian Rodriquez.) As such, Mr. Mason was required to serve a one-year probationary period. 35 C.F.R. §253.42(c). (See PX 5.) This probationary period permitted the Company to evaluate Mr. Mason's performance as an employee and to terminate his services if he failed to fully demonstrate his qualifications for continued employment.

8. In order to receive the travel and transportation expenses authorized by law and government-wide regulations for appointees assigned to posts of duty outside the continental United States, Mr. Mason executed a so-

called "Transportation Agreement." (See Defendant's Exhibit [hereinafter "DX"].) In the agreement, he agreed to remain in the service of the Panama Canal Company for a minimum period of twenty-four months, unless separated because of unsatisfactory performance. The terms of this agreement were established by law and regulation and were not negotiable. Execution of the agreement was required before travel and transportation expenses could be authorized for Mason and his family. No representations were made to him that he was guaranteed a minimum of twenty-four months employment with the Company, and the Company was not obligated to employ Mason for twenty-four months, or for any other specific period. The Agreement expressly provided that Mr. Mason might be terminated during his probationary period. There is no evidence of any employment contract whatsoever obli-

gating the Company to continue Mr. Mason's employment beyond his probationary period. The evidence shows that Mason held his position pursuant to an appointment -- like any other government employee -- and not pursuant to a contract.

9. Mr. Mason began working as the chief estimator and head of the Estimates Section on May 29, 1970. He was responsible for supervising four estimators.

Pursuant to the Panama Canal Personnel Manual, Chapter 430, Mr. Mason was given an entrance rating of "satisfactory" when he first assumed his duties in the Specifications and Estimates Branch.

10. During the first six months of his employment, Mason's performance appeared to be satisfactory. During one period of about a week in August, 1970, he was designated acting

branch chief in the absence of Tanassy and Bierman. In October, 1970, he received another rating of satisfactory.

11. The government's evidence reflected that thereafter Mason did not perform in a satisfactory manner. The testimony revealed:

(a) Bierman and Tanassy noticed that Mason did very little estimating himself -- in marked contrast to his predecessor, Muller -- and that he often did not make specific work assignments to his subordinate estimators.

(b) Mason was chronically late in having the Company's estimates ready at the time that bids were scheduled to be opened. This estimate was important because it was used for comparison with the bids submitted by contractors in order to evaluate those bids. Tanassy and Bierman frequently had to remind Mason that they needed the Company's estimates.

(c) Mason improperly delegated his responsibilities regarding the Engineering Division's Management Information System (MIS), a system used to estimate, and account for, the time needed to complete job assignments. Even though the Division Chief, Mr. Zelnick, had directed that the MIS be handled by supervisors, Mason delegated this task to a subordinate estimator.

(d) The estimates prepared for the 1973 Capital Improvement Program contained a number of errors which Mason failed to correct.

(e) On one occasion Bierman directed Mason to prepare a detailed estimate of the cost of cleaning a petroleum storage tank. Later, when Bierman looked in the file for the estimate it contained nothing more than a single sheet of foolscap with the words, "Bernie Browne says $15,000." Bierman did not consider this to be a satisfactory estimate. (Testimony of Bierman.)

(f) One of the most important projects during 1970 and 1971 was the Coco Solo Hospital project, which was advertised for bids on November 30, 1970. Some time thereafter Mr. Zelnick, the division chief, reviewed the estimates for the project with Bierman and Mason. At this meeting Mason was unable to respond to many of Zelnick's questions, and it was obvious to Bierman that Mason was not familiar with the project. In a memorandum dated March 23, 1971, Mason, himself admitted that he had not reviewed the plans and specifications of the Coco Solo project, and at trial he admitted that he had not reviewed them. (See PX 27, ¶2; Testimony of Mason on cross-examination.)

12. On at least two occasions Bierman spoke with Mason about deficiencies in Mason's work, advising him that he should pay closer attention to his work and stop spending so much time

reading magazines and taking Spanish lessons, and warning him that he could be terminated during his probationary period. In addition, Bierman specifically told Mason that he should do more actual estimating himself. (Testimony of Bierman.) On another occasion Tanassy told Mason that Zelnick was not satisfied with his (Mason's) performance. (Testimony of Tanassy.) Mason's performance, however, did not improve.

13. Some time during February, 1971, the Personnel Division advised Tanassy that Mason's probationary period was coming to an end, and that it was necessary to evaluate him in order to determine whether he should be given a permanent appointment or terminated prior to the close of his probationary period.

14. Tanassy conferred with Bierman and Zelnick. All agreed that Mason's performance had been unsatisfac-

tory. Tanassy did not discuss Mason's performance with anyone else, and specifically he did not confer with Colonel Clark or with Clark's deputy. As a result Tanassy decided to recommend Mason's termination. (Testimony of Tanassy and Bierman.)

15. On March 22, 1971, Tanassy sent his request for Mason's removal to the personnel director. This request discussed in details the reasons for recommending Mason's removal (DX 6.) This request stated Tanassy's opinion of Mason's performance. There is no evidence that it was the result of pressure from Clark, Zelnick, or anyone else. On the same date, Tanassy gave Mason a copy of the request.

16. On March 23, 1971, Mason sent a written rebuttal to the Personnel Office. In his rebuttal, he did not allege that his proposed termination was being coerced by Colonel Clark, or by

anyone else in order to cover up fraud and misfeasance within the Bureau. (See PX 27.)

17. On April 1, 1971, Mason sent a letter to the Governor of the Canal Zone appealing his proposed termination. Again, in this letter he made no accusations against Clark, nor did he allege that he was being terminated as a way of silencing him and preventing him from revealing what he knew about supposed fraud and corruption in the Bureau. (See DX 3.)

18. On April 23, 1971, Mason sent another letter to the Governor. In this letter for the first time he accused Colonel Clark and others in the Bureau of fraud and misuse of public funds. He made the following allegations:

(a) that the Management Information System (MIS) was a fraudulent misappropriation of public funds

designed to cover up the supposedly imprudent utilization of manpower;

(b) that the chief of the Dredging Division, Colonel Walter Fade, submitted a proposal for making improvements on the residence of his assistant and that the proposal involved an illegal waiver of certain overhead charges;

(c) that improvements were made to Colonel Clark's residence in excess of the allowable monetary limit;

(d) that Colonel Clark permitted the successful bidder on the Balboa Road Improvement Contract to raise his bid by $50,000.00 after the bids had been opened;

(e) that the Company spent an excessive amount of money and wasted vast quantities of water in raising a sunken ship; and

(f) that the Paraiso Raw Water Intake was subject to contamination or sabotage and should have been relocated. (See PX 7.)

The thrust of Mason's letter to the Governor was that he was being terminated to prevent him from revealing these alleged instances of misfeasance and corruption. (See PX 7.)

19. The evidence adduced at trial did not support Mason's allegations:

(a) At trial Mason admitted, contrary to his allegations in his letter to the Governor, that the MIS did not involve fraud or corruption. It appears that he and Zelnick simply disagreed as to how the System should be implemented. Zelnick wanted the supervisors to manage the System and he wanted hours accounted for in a certain way, whereas Mason thought that lower-level employees should make the entries in the System, and that certain hours should be added to the cost of individual projects rather than accounted for as general overhead. The evidence

showed nothing resembling fraud or misappropriation of public funds and in no way supported Mason's earlier allegations;

(b) The evidence showed that Colonel Fade did submit a questionable proposal for improvement on his assistant's residence, but it also showed that this proposal was rejected out-of-hand by Bierman and Tanassy. (Testimony of Bierman and Tanassy.) Moreover, there was nothing clandestine about the proposal; it was submitted openly and rejected. There was nothing corrupt or improper about the way that the proposal was handled. There is no persuasive evidence that this incident was in any way connected with Mason's removal.

(c) The evidence suggests that there may have been a cost overrun on the improvements to Colonel Clark's residence, a residence which he rented

from the Company. There was, however, no persuasive evidence connecting any such cost overrun with Mason's termination. First, there was no clear evidence that Clark himself knew of an overrun. Second, there was no evidence that Clark would have realized that Mason knew of an overrun. Third, Mason himself admitted at trial that he had at best only a suspicion of an overrun -- a suspicion based on nothing more than his casual observations of the work being done on Clark's residence. Fourth, the evidence clearly shows that Clark played no role in Mason's termination; he was not Mason's direct supervisor; he did not confer with Bierman or Tanassy prior to Tanassy's request that Mason be terminated; and he exerted no pressure on Bierman or Tanassy concerning the termination. Under these circumstances, the court concludes that the issue concerning Clark's residence has nothing to do with the merits of this case.

(d) The evidence showed that the low bidder on the Balboa Road Improvement Project was permitted to raise his bid by $50,000. Bierman testified that at the time he examined the bidder's worksheets and found an error that would have justified increasing the bid more than $80,000.00, but that the bidder requested an increase of only $50,000.00 After consulting with the Company's general counsel and learning that it was permissible to permit the requested increase of $50,000.00, the Company permitted the bid to be raised. There is no evidence linking this episode with Mason's termination.

(e) The evidence showed that in early 1971 a ship containing rice and cotton sank in the Canal. Because it was feared that the cargo might contaminate the water supply of a nearby community it was decided to pump out the

cargo. There is no credible evidence that this action wasted water or resulted in unnecessary expenditures. Mr. Mason's opinion testimony based for the most part on rumors and newspaper articles is entitled to little or no weight. Mason apparently proposed sealing the gash in the ship with concrete. He made this proposal informally to persons in the Engineering Division. He did make the suggestion to the salvage contractor, who had been hired to raise the ship. Whether or not the suggestion would have worked is unclear. There is no persuasive evidence that it would have worked, and Mason admitted that he had no experience raising sunken ships. Whatever the merits of the suggestion, it had nothing to do with Mason's termination.

(f) The evidence shows that Mason informally suggested to Zelnick that the Paraiso Raw Water Intake be

relocated, because the present facility was, according to Mason, subject to effluents. Mason had not tested the water for effluents or tested the bacteria levels and could present no hard facts to Zelnick, nor had he calculated the cost of moving the facility. Zelnick told him that other sites had been studied and rejected, and under the circumstances -- especially in view of the imprecision of Mason's proposal -- it was not unreasonable for Zelnick to have rejected it. No connection has been shown between this suggestion and Mason's termination.

20. On April 26, 1971, the Company's Personnel Director, notified Mr. Mason that he would be separated effective May 1, 1971, for unsatisfactory workmanship. This notification stated the same reasons for termination as Tanassy's Memorandum of March 22nd. (See DX 10.) Mr. Mason's employment was in fact terminated on May 1, 1971.

21. The evidence shows that Mason was given a full and fair trial in the duties of his position and that the Company was honestly dissatisfied with his performance.

22. After Mr. Mason was notified of his proposed termination, he began applying for other positions in the Company. In one instance, he was determined to be qualified for an NM-13 position but was ineligible to compete for the position because he had not served a full year in his NM-12 position, as was required by the so-called Whitten Amendment which was then in effect. In another instance, he was determined to be qualified and was considered for the position but was not selected. In still another instance plaintiff was deemed not to be qualified because he had not taken the requisite examination. In other instances, plaintiff was determined to be not qualified

because he lacked the necessary experience for the positions in question. In no instance did the evidence show that he was best qualified for any position or that he was unfairly rejected. Moreover, there is no evidence that the Company was obligated to transfer Mason to a new position after he had failed during his probationary period in his original position.

23. After Mr. Mason's termination, the Masons remained in the Canal Zone or in the Republic of Panama for almost a year. They had been living in housing provided by the Company and were required to vacate this housing. They did not, however, move their household goods with them. The Company stored the goods for the Masons and repeatedly told them to provide the Company with an address to which the goods could be shipped. The Masons did not provide such an address until June,

1973, and the goods were promptly shipped shortly thereafter. (See DX 13 through 13C.)

24. While in Panama the goods were stored in a storage facility which was not air conditioned. This was customary, because no air conditioned facilities were available. (Testimony of George Vieto.)

25. After the Masons received their goods they claimed that the goods were damaged, largely because of mildew. Although advised more than once to do so, they never submitted a completed set of claim forms to the Company. (See DX 13D through 13K.)

Conclusions of Law

1. Plaintiffs have not proven that there was an employment contract between Mr. Mason and the Company, and, thus, they have proven no breach of contract. Because it is clear from the evidence that there was no such

contract, plaintiffs' breach of contract claim fails.

2. The Panama Canal Company was an agency and instrumentality of the United States, see 2 Canal Zone Code (hereinafter "CZC") §61(a), 76A Stat. 8 (1962), with the authority to appoint, fix the compensation of, and define the authority and duties of its employees. 2 CZC §121(a)(1), 76A Stat. 15.

3. The provisions of the Canal Zone Merit System for appointment, reappointment, reinstatement, re-employment, and retention, with respect to positions, employees, and individuals under consideration for appointment to positions, are established by regulations under authority of the President of the United States. See 2 CC §149(a), 76A Stat. 18; 35 C.F.R. Parts 251, 253 (1971).

4. A Canal Zone Merit System appointment to a position in the Panama

Canal Company is an appointment in the Federal Service. See 2 CZC §149(d), 76A Stat. 18.

5. Mr. Mason was appointed to his position with the Company. He did not hold his position by virtue of a contract with the Company.

6. Before an agency (e.g. Panama Canal Company) may pay travel and transportation expenses of a new appointee to a post of duty outside the continental United States, see 5 U.S.C. 5722(a)(1), the new appointee must agree in writing to remain in the government service for a minimum period (in this case 12 months) after his appointment unless separated for reasons beyond his control which are acceptable to the agency. Before an agency may pay return travel and transportation expenses the employee also must agree in writing to remain in the government service for a period of time (in this case for twenty-

four months) unless separated for reasons beyond his control which are acceptable to the agency. See 5 U.S.C. 5722(a)(2). This agreement in writing (referred to as a "Transportation Agreement") is not an employment contract and does not constitute a guarantee or promise by the agency that new appointees will remain in the employ of the agency for the prescribed minimum period of service. The Panama Canal Company, in paying plaintiff's travel and transportation expenses to and from the Canal Zone, as authorized under 5 U.S.C. Chapter 57, fulfilled its duties and obligations under the agreement. There has been, therefore, no breach of the Transportation Agreement.

7. Pursuant to 35 C.F.R. §253.42(c) (1971), Mr. Mason was required to serve a one-year probationary period. The Company was permitted to utilize this probationary

period as fully as possible to determine Mason's fitness for his position and to terminate his services during the probationary period if he failed to demonstrate fully his qualifications for continued employment. In making a determination as to whether Mason's performance or conduct was satisfactory, the Company was required to give the probationer a full and fair trial in the duties of the position. 35 C.F.R. §253.242 (1971). Mr. Mason was given a full and fair opportunity to perform in his position.

8. If it is determined that a probationer's duty performance or conduct is unsatisfactory, he may be terminated by notifying him in writing of the reasons for his separation and its effective date. 35 C.F.R. §253.242 (1971). If no action is taken to termine the probationer he automatically acquires a merit status upon completion

of the one year probationary period. Id.

9. Probationary employees in the Federal Service constitute a class which Congress has specifically recognized as being entitled to less comprehensive protection than permanent or tenured employees. In Sampson v. Murray, 415 U.S. 61 (1974), the Court noted:

> We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections, but with a probationary employee, a class which Congress has specifically recognized as entitled to less comprehensive procedures...It is also clear from other provisions of the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service. For example, preference eligibles, commonly veterans, are entitled to hearing procedures only after they have completed 'a probationary or trial period.' Id. at 80-81. (Emphasis supplied.)

Moreover, in Arnett v. Kennedy, 416 U.S. 134 (1974), a plurality of the Court ackowledged that, upon termination, a federal employee is entitled only to those procedural safeguards set forth in statute and regulations. Id. at 151-152. As pointed out in Arnett, a government employee's property interest in employment is itself conditioned by the procedural limitations which accompany the grant of that interest. ID. at 154-55. There is no common law property interest in government employment enforceable through a common law action. To recognize such an interest would be contrary to the Supreme Court's decision in Arnett. The Panama Canal Company, indeed the federal government as a whole, has a legitimate interest in terminating an incompetent or unsatisfactory employee during his probationary period while the procedures for doing so are relatively simple, instead of

waiting until such individuals become tenured employees entitled to more formal termination requirements. See Marcus v. United States, 473 F.2d 896, 900 (Ct. Cl. 1973).

10. The procedures which govern termination of probationers employed by the Panama Canal Company are those set forth in 35 C.F.R. §253.242. 35 C.F.R. §253.242 provides:

> Any employee serving a probationary period shall be given a full and fair trial in the duties of the position in which appointed. If the performance of his duties or his conduct during the probationary period is not satisfactory to the employing department, his services may be terminated by notifying him in writing of the reasons for his separation and of its effective date.

This regulation does not require that a probationary employee be first given an unsatisfactory performance rating before he can be terminated. An "unsatisfactory" performance rating is not a prerequisite for removal of a

federal employee, let alone a probationary employee. Doe v. Hampton, 566 F.2d 265, 268 N.2 (D.C. Cir. 1977); Armstrong v. United States, 405 F.2d 1275, 1279 (Ct. Cl. 1969); Menick v. United States, 184 Ct. Cl. 757, 784 (1960).

In Thomas v. Ward, 225 F.2d 953 (D.C. Cir. 1955), appellant, a tenured employee, was removed from his position pursuant to charges of "unsatisfactory services," under applicable provisions of the Lloyd-LaFollette Act (now codified as 5 U.S.C. §7501). Appellant asserted that his dismissal for "unsatisfactory services" was equivalent to dismissal on the ground of an "unsatisfactory performance rating," and that he had not received the ninety-day warning of unsatisfactory performance required by the statute [now 5 U.S.C. §4304(b)] as a condition for receiving an unsatisfactory rating. Id. at 954.

The Court rejected appellant's contention.

> While an unsatisfactory performance rating may sometimes lead to dismissal for cause, it may also justify lesser personnel action...On the other hand, though an employee's ordinary over-all performance of duties throughout the rating period may be rated as satisfactory, he may still be guilty of conduct in connection with the execution of his official duties, either in particular instances, or in a particular aspect of his tasks which would justify dismissal under [5 U.S.C. 7501] ...[B]oth presentation of charges and unsatisfactory ratings [are] available as means of dismissing an inefficient employee... Id. at 955.

Defendant's Performance Rating Plan set forth in PCPM Chapter 430, to the extent it applies to probationers, was complied with by defendant in evaluating Mr. Mason's performance. Nothing in this Chapter requires an unsatisfactory rating per se as a prerequisite to the termination of a probationary employee. The stated purpose of the Company's Performance Rating Plan

(PRP) set forth in PCPM Chapter 430 is to evaluate the work performance and to recognize merit of employees and their contributions to efficiency and economy. PCPM Chap. 430.1-2(a). Because probationary employees are an integral part of defendant's workforce, the plan covers all employees. See PCPM Chap. 430.1-3. While Chapter 430.2-6 provides that a written warning must be given an employee at least ninety days prior to an unsatisfactory rating, nothing in Chapter 430 requires that an employee -- let alone a probationary employee -- first be given an unsatisfactory rating preceded by a ninety-day warning as a precondition to removal. It simply provides that if an employee is given an unsatisfactory performance rating, he must first be given a ninety-day warning. Chapter 430 also provides that an unsatisfactory rating is a basis for removing an employee (See Chap. 430.2-8),

but it does not provide that an unsatisfactory rating is the only basis for removal, and it does not purport to deal with the termination of a probationary employee. Chapter 430.2-8 provides that a removal or adverse action must comply with the procedures prescribed in Chapter 752 of the Personnel Manual. Chapter 752 is captioned "Adverse Actions" and prescribes, inter alia, the procedures for removing a permanent employee, but by its terms it does not apply to probationary employees.

11. While performance ratings are important in the overall scheme of personnel administration ([e.g., they are considered in connection with a variety of personnel actions such as promotions, demotions, removals and RIF's, see PCPM Chap. 430.2-2(b)] the procedures under which said ratings are made, do not directly, or by implication, modify or supersede the authority

of defendant's officials to remove employees under procedures and regulations specifically applicable to personnel actions of that character. Jones v. Hobby, 223 F.2d 345, 346 (D.C. Cir. 1955).

The applicable provisions for terminating a probationary employee of the Panama Canal Company are 35 C.F.R. §253.242. Said provisions were followed in this case. Defendant did not, nor was defendant required to, follow the provisions of PCPM Chap. 430 before terminating plaintiff. Even assuming arguendo plaintiff had been given an "unsatisfactory" performance rating pursuant to PCPM Chap. 430, such could not have served as the basis for his removal. Any removal or other adverse action initiated pursuant to an "unsatisfactory" rating must comply with the procedures prescribed in PCPM, Chap. 752 Adverse Actions. PCPM Chap. 430.2-8. However, probationary

employees are specifically excluded from coverage of Chapter 752. PCPM Chap. 752-1-5(b)(1). Plaintiff's removal was properly carried out and did not in any way violate PCPM Chapter 430.

12. The procedures for terminating probationary employees of the Panama Canal Company were consistent with those generally applicable elsewhere in the federal service, see Ring v. Schlesinger, 502 F.2d 479 (D.C. Cir. 1974), and were followed in terminating Mr. Mason. The procedures which governed Mason's termination, i.e., 35 C.F.R. §§253.42(c) and 253.242, did not provide for an administrative appeal of the termination decision or a hearing. The Company's statement of reasons for termination were not of the type that might seriously damage his standing and associations in his community and there has been no showing that defendant imposed on him a stigma or

other disability that foreclosed his freedom to take advantage of other employment opportunities. The Company stated the deficiencies in Mason's work, which it was required to do in order to separate him. The Company was not therefore required to give plaintiff a hearing when it terminated him.

As the Supreme Court has stated in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

The court of appeals for this circuit has recently remarked that "a legitimate claim of entitlement must derive from some reasonably identifiable source apart from the mere expectance or desire of the claimant." Colm v. Vance, 567 F.2d 1125, 1129 (D.C. Cir. 1977). Accord, Foster v. Ripley, U.S. App. D.C.

No. 79-2107, decided April 7, 1981, slip opinion at 14-17.

13. To the extent that the Masons' claim damage to their household goods from mildew presumably resulting from storage in an un-airconditioned facility, the court finds that defendants were not negligent in storing the Masons' property in such a facility because air-conditioned facilities were not available. Thus, it was not unreasonable to store the goods in an un-air conditioned facility. Moreover, the Masons themselves were responsible for leaving the goods stored in Panama for more than two years after Mr. Mason's termination. Any damage due to mildew was proximately caused by their own dereliction.

14. To the extent that plaintiffs claim damage to their households goods from causes other than mildew, they have not proven their claim. Using

a list prepared for the purpose of litigation, Mrs. Mason testified that certain items were cracked or broken when she received them in 1973. (See PX 446). Her testimony from a list prepared eight years after the event was not convincing. More importantly, plaintiffs presented no credible testimony as to the value of the goods or the value of the damage to them. They did not present an expert witness on the issue of value, and Mrs. Mason's lay testimony about their value was entirely too speculative and self-serving to provide a basis for the assessment of damages. Consequently, their claim concerning damage to personal property also fails.

15. The plaintiff has filed to meet his burden to prove the allegations in his complaint by a preponderance of the evidence.

16. Judgment shall be entered for defendants dismissing this case.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
PANAMA CANAL COMMISSION et al.,	)	Civil Action No. 74-872
	)	
Defendants.	)	Filed Aug 24, 1981
	)	

JUDGMENT AND ORDER

Upon consideration of the evidence adduced at trial as set forth in the court's findings of fact and conclusions of law filed herewith, it is, by the court, this 24th day of August, 1981,

ORDERED, ADJUDGED and DECREED that judgment is entered for defendants; and it is further

ORDERED that this action is dismissed with prejudice.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al., Plaintiffs,	)	
v.	)	Civil Action No. 74-872
PANAMA CANAL COMPANY/ GOVERNMENT, et al., Defendants.	)	Filed May 11, 1979

MEMORANDUM OPINION

This matter comes before the court on the defendants' motion to dismiss three of the four counts of the amended complaint, filed May 16, 1978, pursuant to Rule 12 of the Federal Rules of Civil Procedure. The defendants remaining in this case are the Canal Zone Government, an independent agency charged with performing the various duties of civil government in the Panama Canal Zone, 2 C.Z.C. § 31, 76A Stat. 7, and the Panama Canal Company, a separate corporate agency and instrumentality of the United States, id. §61, 76A Stat. 8,

which operates the Panama Canal and performs a wide range of other functions, id. § 66, 76A Stat. 11-12. 1/ In their amended complaint, the plaintiffs, Irvin Mason and his wife and daughter, contend that the defendants wrongfully terminated Mason's employment, committed numerous tortious wrongs aginst the family, including violations of various of their constitutional rights, and conspired to have the Masons deported from the Canal Zone, all in an effort to prevent the Masons from exposing corruption within the Panama Canal Company. The Masons seek injunctive relief and

---

1/ The plaintiffs also have named a third defendant, Charles R. Clark, Director of the Transportation and Terminals Bureau of the Panama Canal Company, but five years have elapsed since this suit was brought and Clark has not yet been served. The court, therefore, will dismiss Clark as a defendant pursuant to Rule 12(b)(5). See Picking v Pennsylvania R. Co., 151 R.2d 240, 252 (3d Cir. 1945); Bradley v. Clegg, 403 F. Supp. 830, 834, (E.D. Wis. 1975).

damages totalling $22,020,000. The defendants now move the court to dismiss Count I on the ground that the court lacks subject-matter jurisdiction over that claim and to dismiss Counts II and III on the ground that the plaintiffs have filed therein to state a claim upon which relief can be granted. For the reasons set forth below, the court will grant in part and deny in part the motion to dismiss.

I. Count I

In Count I, Irvin Mason alleges that he was wrongfully discharged from his employment with the Panama Canal Company on May 1, 1971, shortly before the expiration of his one-year probationary appointment. As far as the court can ascertain from the amended complaint, Mason brings his wrongful termination action under two theories. First, Mason contends that the Company subjected him to an unjustified personnel

action within the meaning of the Back Pay Act, 5 U.S.C. § 5596 (1976). 2/ Mason also contends that the Company's action breached a contract of employment with him in violation, presumably, of the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976). 3/

The Back Pay Act was held applicable to the Panama Canal Company in Payne v. Panama Canal Co., 428 F. Supp. 997 (D.C.Z. 1977). The defendants contend, however, that Mason's claim under the Act is time-bared, because Mason did not bring suit within three years after his cause of action had accrued, which is the limitation period in the Canal Zone for cases involving liability created by statute. 5 C.Z.C. § 42(3)(a), 76A Stat. 282. But the three-year limitation applies only where

---

2/ Amended Complaint, ¶ 10.

3/ Id. ¶ 9.

there is not "a different limitation... prescribed by statute." Id. § 41(a), 76A Stat. 281. Although it is true, as the defendants point out, that the Back Pay Act does not specify a limitation period, the Court of Appeals for this Circuit has held that the six-year limitation period set forth in 28 U.S.C. § 2401(a) (1976) applied to actions under the Act. 4/ Saffron v. Department of the Navy, 183 U.S. App. D.C. 45, 48-49, 561 F.2d 938, 941-42 (1977). Because this is "a different limitation...prescribed by statute," the court will deny the motion to dismiss Count I. 5/

4/ Section 2401(a) specifies that "[e]very civil action commenced against the United States shall be barred unless a complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (1976).

5/ Because Mason may proceed on his claim under the Back Pay Act, he has no cause of action under a contract theory. See United States v. Hopkins, 427 U.S. 123, 128 (1976).

II. Count II

In Count II, the Masons contend that the defendants initiated a ten-month long "unlawful and tortious" campaign against them to prevent the Masons from continuing to expose alleged corruption in the Panama Canal Company. Although the acts complained of in Count II are too numerous to catalogue in full here, the Masons assert that the alleged "determined campaign of malice, fraud and oppression" included discriminatory and unlawful rejection of Irvin Mason for all alternative employment in the Canal Zone; refusals to grant business operating permits and licenses to the Mason Engineering Corporation; denial of, and interference with, use by the Masons of important privileges and facilities in the Canal Zone; and eventual deportation of the Masons from the Canal Zone. Count II represents a single claim for compensatory and punitive

damages, but the myriads of factual allegations stated therein involve different grounds of jurisdiction and theories of recovery. Assuming the for purpose of this Rule 12(b)(6) motion the truth of the allegations set forth in Count II, the court concludes that the plaintiffs have failed to state a claim upon which relief can be granted.

The defendants correctly observe that, although the Masons identify the Panama Canal Company as the perpetrator of the acts enumerated in Count II, virtually every allegation by the plaintiffs is directed at components of the Canal Zone Government, such as the Canal Zone Police Division, the Canal Zone Division of Schools, the Canal Zone Postal Service, or the Governor of the Canal Zone. 6/ The Masons do not dispute the defendants'

6/ Amended Complaint, ¶¶ 13, 16, 18-24, 26-27, 29-30, 33, 37.

contention that the Canal Zone Government fully enjoys the sovereign immunity of the United States. 7/ It is well settled that "the United States may be sued only when, as, and in, the court in which it has expressly consented to be sued...." Wells v. United States, 214 F.2d 380, 382 (5th Cir.), cert. denied, 348 U.S. 855 (1954). The Masons explicitly have disavowed any intention to seek redress under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. (1976), which removed the sovereign immunity of the United States from suits in tort like that brought here. Because the plaintiffs have failed to demonstrate that some other statute expressly waives the immunity of the Canal Zone Government to suit, their claims for tortious wrongs

7/ As noted supra, the Canal Zone Government is charged by 2 C.Z.C. §31, 76A Stat. 7 with the performance of the duties of civil government in the Canal Zone.

allegedly committed by the Zone Government cannot withtand a motion to dismiss. 8/

Similarly, under their theory of the case, the Masons clearly cannot recover damages for alleged violations of the family's constitutional rights. The Masons contend that the defendants violated rights secured to them by the first, fourth, fifth and sixth amendments and by Title 1, Section 31 of the Canal Zone Code, 76A Stat. 2, which is modeled on the Bill of Rights of the

8/ The plaintiffs attempt to evade the immunity barrier by arguing that the Panama Canal Company was legally responsible for the acts of the Canal Zone Government on the ground that they were "planned in detail" by the "legal section of the Company" because "the Zone Government has no legal department." According to §§ 21.61--.67 of the Canal Zone Administration and Regulations (1966), however, the Canal Zone Government does have an Office of the General Counsel. Not only do the plaintiffs' contentions appear to be facially inaccurate, but they do not appear in the amended complaint and are raised for the first time in the opposition to the motion to dismiss.

United States Constitution. 9/ But the plaintiffs cannot bring their claim for damages within the scope of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), or subsequent decisions dealing with damage actions implied directly from the Constitution. The plaintiffs have proceeded in this suit not against individual officers, agents, or employees of the Canal Zone Goernment, but rather against the sovereign itself. Thus, the present case is distinguishable from Bivens, where the plaintiffs brought an action for damages against federal agents instead of against the United States, which "still remains immune to suit." Id. at 410. (Harlan, J., concurring). The fact that the plaintiffs contend that they have been denied due process and the equal protec-

9/ Amended Complaint, ¶ 37.

tion of the laws 10/ "add[s] nothing jto [their] complaint." Monarch Insurance Co. v. District of Columbia, 353 F. Supp. 1249, 1254 (D.D.C. 1973), aff'd, 162 U.S. App. D.C. 97, 497 F.2d 684 (1974). The plaintiffs have no independent cause of action for damages against the United States based upon a claim of violation of the due process and equal protection guarantees of the Constitution.

The Masons also fail to state a claim upon which relief can be granted under 42 U.S.C. §§ 1981--1988 (1976). The plaintiffs have disavowed reliance upon allegations of racial discrimination, which are necessary for a successful claim under Sections 1981 11/ and

10/ Id.

11/ National Association of Government Employees v. Rumsfeld, 413 F. Sup. 1224, 1228 (D.D.C. 1976), aff'd, 181 U.S. App. D.C. 199, 556 F.2d 76 (1977).

1982, 12/ and have not alleged facts sufficient to show that they were victims of a "class-based, indiviously discriminatory animus," 13/ which is an indispensable element of a cause of action under Section 1985(3). Because the plaintiffs have not established a claim or cause of action under Section 1985, no claim for relief may lie under Section 1986. 14/ Section 1983 does not apply to actions of the federal government or its agents, 15/ while Sections 1984 16/ and 1988 17/ alone cannot serve as the basis for a cause

12/ Lee v. Minnock, 417 F. Supp. 436, 439 (W.D. Pa. 1976), aff'd, 556 F.2d 567 (2d Cir. 1977).

13/ Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

14/ Pyles v. Keane, 418 F. Supp. 269, 271 N.1 (S.D.N.Y. 1976).

15/ District of Columbia v. Carter, 409 U.S. 418, 424 (1973).

16/ Weaver v. Haworth, 410 F. Supp. 1032, 1036 (E.D. Okla. 1975).

17/ Reeves v. American Optical Co., 408 F. Supp. 297, 302 (W.D.N.Y. 1976).

of action or claim in the federal courts. Finally, the Masons have pointed the court to no cases holding that Section 1987, which provides that the Attorney General, United States Attorney, and other designated officials are required to institute prosecurtions for violations of specific civil rights statutes, confers a private right of action thereunder. 18/

The court has reviewed the other jurisdictional grounds and theories of recovery advanced by the plaintiffs and concludes that they, too, cannot withstand the defendants' motion to dismiss. 19/ Therefore, the court will dismiss Count II pursuant to Rule 12(b)(6).

18/ See Peek v. Mitchell, 419 F.2d 575 (5th Cir. 1969).

19/ The court agrees with the defendants that the plaintiffs' allegations of wrongful eviction in the amended complaint (¶15) are res judicata.

III. Count III

In Count III, the Masons seek $10,000,000 in compensatory and punitive damages for injuries allegedly received as a result of a purported "cover-up" of "serious misconduct by high-ranking Company/Government officials involving multiple violations of the Masons' legal and civil rights and malfeasance and misfeasance in office." 20/ The plaintiffs' discussion of the boundaries of official immunity as articulated by the Supreme Court in Butz v. Economou, ___ U.S. ___, 98 Sup. Ct. 2894 (1978), has no relevance to the present action because, as noted above, the Masons have failed to make out a Bivens claim. Further, the plaintiffs' reliance on various criminal statutes of the United States and the Canal Zone is misplaced. Violations of criminal statutes can be enforced only by the proper prosecuting

20/ Amended Complaint, ¶ 45.

party and not by private parties. Gerbig v. ITT Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla. 1971); Bass Anglers Sportsman's Society v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971). Therefore, the court will dismiss Count III for failure to state a claim upon which relief can be granted.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
PANAMA CANAL COMMISSION et al.,	)	Civil Action No. 74-872
	)	
Defendants.	)	Filed Aug 24, 1981
	)	

ORDER

Upon consideration of the defendants' motion to dismiss and the opposition thereto, and the court having heard the oral argument of counsel, and for the reasons set forth in the court's Memorandum Opinion filed this day, it is, by the court, this 11th day of May, 1979,

ORDERED that the motion to dismiss Count I be, and the same hereby is, denied; and it is further

ORDERED that the motion to dismiss Counts II and III of the amended complaint be, and the same hereby is,

granted; and it is further

ORDERED that the status call shall be held in this case on May 29, 1979 at 9:45 a.m.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX C

Article VI, U.S. Constitution

"...This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land..."

The First and Fifth Amendments to the U.S. Constitution are incorporated in Title 1 of the Canal Zone Code, as follows:

1 CZC 31 [76A Stat. 2] Rights and guarantees

"The principles of government enumerated below, that are essential to the rule of law and the maintenance of order, have applicability and force in the Canal Zone:

***

"(3) Laws abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for a redress of grievances are void.

***

"(5) A person may not be:

(C) deprived of life, liberty, or property without due process of law."

Relevant parts of the Memorandum of Understandings, item 1, to 1955 Treaty between the United States of American and the Republic of Panama are at Appendix D, p. 5-6.

APPENDIX D

Canal Zone Code

2 CZC §61 [76A Stat. 8] Continuation, purposes, offices and residence of the Company

"(c)...Within the meaning of the laws of the United States relating to venue in civil actions, the Company is an inhabitant and resident of the Canal Zone and of the District of Columbia."

2 CZC §142 [76A Stat. 16] General rules governing wage and employment practices

"(a) The head of each department shall conduct the wage and employment practices in the Canal Zone of his department in accordance with the:

(1) principles established in item 1 of the Memorandum of Understandings set forth in section 1(b) of Public Law 85-550 (July 25, 1958, 72 Stat. 405);

(2) provisions of this subchapter;

(3) regulations promulgated by, or under the authority of, the President of the United States in accordance with this subchapter; and

(4) provisions of applicable law.

(b) To the extent he deems appropriate, the President may:

(1) exlude any employee or position from this subchapter or from any provision of this subchapter; and..."

2 CZC §143 [76A Stat. 16] Employment Standards

"The head of each department shall establish written standards for the:

(1) determination of the qualifications and fitness of employees and of individuals under consideration for appointment to positions; and
(2) selection of individuals for appointment, promotion, or transfer to positions.

The standards shall conform with this subchapter, the regulations referred to in section 155(a) of this title, and the Canal Zone Merit System referred to by section 149 of this title."

2 CZC §145 [76A Stat. 17] Uniform application of standards and rates

"The established employment standards and rates of basic compensation established pursuant to sections 143 and 144 of this title shall be applied uniformly, irrespective of whether the employee or individual concerned is a citizen of the United States or a citizen of the Republic of Panama."

2 CZC §149 [76A Stat. 18] Canal Zone Merit System

"(a) Subject to this subchapter, the President or his designee may, from time to time, amend or modify the provisions of the Canal Zone Merit System of selection for appointment, reappointment, resinstatement, re-employment, and retention, with respect to positions, employees, and individuals under consideration for appointment to positions, established by regulations under authority of the President.

"(b) The Canal Zone Merit System, irrespective of whether the employees or individuals concerned are citizens of the United States or citizens of the Republic of Panama, shall:

(1) be based solely on the merit of the employee or individual and upon his qualifications and fitness to hold the position concerned; and

(2) apply uniformly within and among all departments to position, employees, and individuals concerned.

"(c) The Canal Zone Merit System shall:

(1) conform generally to policies, principles, and standards established by or in accordance with the Civil Service Act of January 16, 1883, as amended and supplemented; and

(2) include provision for appropriate interchange of citizens of the United States employed by the Government of the United States between the merit system and the competitive civil service of the Government of the United States."

2 CZC §155 [76A Stat 19] Administration by President; regulations; delegation of authority

"(a) The President shall coordinate the policies and activities of the respective departments under this subchapter, and may promulgate regulations necessary and appropriate to carry out the provisions and accomplish the purposes of this subchapter."

4 CZC §1351 [76A Stat. 125] Abstinence from injuring others

"Every person is bound, without contract, to abstain from injuring the person or property of another, or infrnging upon any of his rights."

4 CZC §4641. [76A Stat. 263] Damages for detriment from unlawful act or omission

"A person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

4 CZC §4701 [76A Stat. 265] Breach of obligation other than contract

"For the breach of an obligation not arising from contract the measure of damages, except where otherwise expressly provided by this title, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

6 CZC §132 [76A Stat. 418] Civil liability for offenses; effect of this title

"The omission to specify or affirm in this title any liability to damages, penalty, forfeiture, or other remedy imposed by law, and allowed to be recovered or enforced in a civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce it."

PUBLIC LAW 85-550-July 25, 1958

AN ACT

To implement item 1 of a Memorandum of Understandings attached to the treaty of January 25, 1955, entered into by the Government of the United States of America and the Government of the Republic of Panama with respect to wage and employment practices of the Government of the United States of America in the Canal Zone.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

FINDINGS

Section 1. (a) The Congress of the United States of America hereby finds that the Government of the United States of America and the Government of Republic of Panama on January 25, 1955, entered into a treaty (known as the Treaty of Mutual Understanding and Cooperation), to which was attached a Memorandum of Understandings Reached (otherwise referred to as the Memorandum of Understandings), signed by such governments on such date.

(b) The Congress further finds that, under such Memorandum of Understandings, the Government of the United States assumed certain obligations set forth in item 1 of such Memorandum as follows:

"1. Legislation will be sought which will authorize each agency of the United States Government in the Canal Zone to conform its existing wage practices in the Zone to the following principles:

***

"The United States will afford equality of opportunity to citizens of Panama for employment in all United States Government positions in the Canal Zone for which they are qualified and in which the employment of United States citizens is not required, in the judgment of the United States, for security reasons.

"The agencies of the United States Government will evaluate, classify, and title all positions in the Canal Zone without regard to the nationality of the incumbent or proposed incumbent..."

(c) The Congress further finds that the enactment of legislation containing a statement of general policies and principles and other provisions in implementation of item 1 of such Memorandum of Understandings is necessary to the faithful and proper discharge of the obligations assumed by the Government of the United States under such item.

DEFINITIONS

SEC. 2. As used in the following provisions of this Act, the term--

(1) "department" means a department, agency, or independent establishment in the executive branch of the Government of the United States (including a corporation wholly owned or controlled by the United States) which conducts operations in the Canal Zone;

(2) "position" means those duties and responsibilities of a civilian nature under the jurisdiction of a department (A) which are performed in the Canal Zone or (B) with respect to which the exclusion of individuals

from the Classification Act of 1949, as amended, is provided for by section 202 (21) (B) of such Act as amended by section 16(a) of this Act;

(3) "employee" means any individual holding a position;

***

GENERAL RULES FOR EMPLOYMENT AND WAGE PRACTICES OF UNITED STATES GOVERNMENT IN THE CANAL ZONE

SEC. 3. (a) The head of each department is authorized and directed to conduct the employment and wage practices in the Canal Zone of such department in accordance with--

(1) the principles established in item 1 of the Memorandum of Understandings set forth in section 1(b) of this Act,

(2) the provisions of this Act;

(3) the regulations promulgated by, or under authority of, the President of the United States in accordance with this Act; and

(4) provisions of applicable law.

(b) The President is authorized, to the extent he deems appropriate--

(1) to exclude any employee or position from this Act or from any provision of this Act, and

(2) to extend to any employee, whether or not such employee is a citizen of the United States, the same rights and privileges as are provided by applicable laws and regulations for citizens of the United States employed in the competitive civil service of the Government of the United States.

EMPLOYMENT STANDARDS

SEC. 4. (a) The head of each department shall establish written standards,

in conformity with this Act, the regulations promulgated under section 15 (b) of this Act, and the Canal Zone Merit System established under section 10 of this Act, for--

(1) the determination of the qualifications and fitness of employees and of individuals under consideration for appointment to positions, and

(2) the selection of individuals for appointment, promotion, or transfer to positions.

(b) Such standards shall be placed in effect on such date as the President shall prescribe but not later than the one hundred and eightieth day following the date of enactment of this Act.

***

UNIFORM APPLICATION OF EMPLOYMENT STANDARDS AND RATES OF COMPENSATION

SEC. 6. The employment standards established under section 4 of this Act and the rates of basic compensation established under section 5 of this Act shall be applied uniformly, within and among all departments, to the respective positions, employees (other than employees who are citizens of the United States and are assigned to work in the Canal Zone on temporary detail), and individuals under consideration for appointment to positions, irrespective of whether the employee or individual concerned is a citizen of the United States or a citizen of the Republic of Panama.

CANAL ZONE MERIT SYSTEM

SEC. 10. (a) There shall be established, in conformity with this

Act, and by regulations promulgated by, or under authority of, the President, a Canal Zone Merit System of selection for appointment, reappointment, resinstatement, reemployment, and retention with respect to positions, employees, and individuals under consideration for appointment to positions.

(b) The Canal Zone Merit System, irrespective of whether the employees or individuals concerned are citizens of the United Sates or citizens of the Republic of Panama, shall--

(1) be based solely on the merit of the employee or individual and upon his qualifications and fitness to hold the position concerned, and

(2) apply uniformly within and among all departments to positions, employees, and individuals concerned.

(c) The Canal Zone Merit System--

(1) shall conform generally to policies, principles, and standards established for or in accordance with the Civil Service Act of January 16, 1883, as amended and supplemented, and

(2) shall include provision for appropriate interchange of citizens of the United States employed by the Government of the United States between such merit system and the competitive civil service of the Government of the United States.

(d) The Canal Zone Merit System shall be placed in effect on such date as the President shall prescribe but not later than the one hundred and eightieth day following the date of enactment of this Act.

ADMINISTRATION

SEC. 15. (a) The President shall coordinate the policies and activities of the respective departments under this Act.

(b) The President is authorized to promulgate such regulations as may be necessary and appropriate to carry out the provisions and accomplish the purposes of this Act.

(c) The President is authorized to delegate any authority vested in him by this Act and to provid for the redelegation of any such authority.

UNITED STATES CODE

5 U.S.C. 2302 Prohibited personnel practices

"(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

***

(8) take...a personnel action with respect to any employee...as a reprisal for--

(A) a disclosure of information by an employee...which the employee...reasonably believes evidences--(i) a violation of any law, rule, or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety..."

5 U.S.C. 4304 Actions based on unacceptable performance

"(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b) (1) An employee...is entitled to--

***

(D) a written decision which--
(i)...specifies the instances of unacceptable performance by the employee...and
(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

***

(e) Any employee who is...in the competitive service...is entitled to appeal...to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to--
(2)...an employee...serving a probationary...period..."

5 U.S.C. 5596. Back pay due to unjustified personnel action

***

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period

if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation." (text in force 1971)

***

5 U.S.C. §5751. Travel expenses of witnesses

"(a) Under such regulations as the Attorney General may prescribe, an employee as defined by section 2105 of this title...by his agency, to testify or produce official records on behalf of the United States is entitled to travel expenses under subchapter I of this chapter. If the case involves the activity in connection with which he is employed, the travel expenses are paid from the appropriation otherwise available for travel expenses of the employee under proper certification by a certifying official of the agency concerned. If the case does not involve its activity, the employing agency may advance or pay the travel expenses of the employee, and later obtain reimbursement from the agency properly chargeable with the travel expenses.

"(b) An employee as defined by section 2105 of this title...summoned, or assigned by his agency, to testify in his official capacity or produce official records, on behalf of a party other than the United States, is entitled to

travel expenses under subchapter I of this chapter, except to the extent that travel expenses are paid to the employee for his appearance by the court, authority, or party which caused him to be summoned."

5 U.S.C. §6322. Leave for jury or witness service; official duty status for certain witness service

"(a) An employee as defined by section 2105 of this title...is entitled to leave, without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance of efficiency rating, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve--

(1) as a juror; or

(2) as a witness on behalf of a party other than the United States, the District of Columbia, or a private party;

in the District of Columbia, a State, territory, or possession of the United States including the Commonwealth of Puerto Rico, the Canal Zone, or the Trust Territory of the Pacific Islands. For the purpose of this subsection, 'judicial proceeding' means any action, suit or other judicial proceeding, including any condemnation, preliminary, informational, or other proceeding of a judicial nature, but does not include an administrative proceeding.

"(b) An employee as defined by section 2105 of this title...is performing official duty during the period with respect to which he is summoned, or assigned by his agency, to--

"(1) testify or produce official records on behalf of the United States or the District of Columbia; or

"(2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia

"(c) The Office of Personnel Management may prescribe regulations for the administration of this section."

5 U.S.C. 7701 Appellate procedures

"(a) An employee...may submit an appeal to the Merit Systems Protection Board from any action which is applicable to the Board under any law, rule, or regulation...

"(b) ...in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge...

"(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

(A) in the case of an action based on unacceptable performance described in section 4303 of this title is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee...

***

(B) shows that the decision was based on a prohibited personnel practice described in section 2302(b) of this title;
(C) shows that the decision was not in accordance with law."

22 U.S.C. 3653 Employment standards

"The head of each agency shall establish written standards for--
(1) determining the qualifications and fitness of employees and of candidates for employment in position; and
(2) selecting individuals for appointment, promotion, or transfer to positions.

"The standards shall conform to the provisions of this subpart, any regulations prescribed thereunder, and the Panama Canal Employment System."
(PL 96-70, Sept. 27, 1979, 93 Stat. 464)

22 U.S.C. 3781 Assets and liabilities of the Panama Canal Company

"All property and other assets of the Panama Canal Company shall revert to the United States on October 1, 1979, and, except as otherwise provided by law, the United States shall assume the liabilities, including contractual obligations, of the Panama Canal Company then outstanding. The Commission may use such property, facilities, and records of the Panama Canal Company as are necessary to carry out its functions."

28 U.S.C. §2680 Exceptions [Federal Tort Claims Act]

"The provisions of this chapter and section 1346(b) of this title shall not apply to--

***

(m) Any claim arising from the activities of the Panama Canal Company." (as amended 64 Stat. 1038, 1043, on September 26, 1950, and effective thru the Panama Canal Act of 1979)

APPENDIX E

Local Rules, U.S. Court of Appeals For the District of Columbia Circuit

Rule 8(f): "CITATIONS IN BRIEFS...Unpublished orders, including explanatory memoranda of this Court, are not to be cited in briefs or memoranda of counsel as precedents. However, counsel may refer to such orders and memoranda for such purposes as application of the doctrines of res judicata, collateral estoppel, and law of the case, which turn on the binding effect of the judgment, and not its quality as precedent. See Rule 13(c)..."

Rule 13(c): "ORDER FORM OF DECISION. In accordance with recommendations for improvement of judicial administration, 1/ this Court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by an order of a decision or judgment of a court or administrative agency, a judgment of a court

---

1/ "Report of the President's Commission on Crime in the District of Columbia (1966) p. 308; and see Canon 19 -- American Bar Association Canons of Judicial Ethics; position adopted by the Judicial Conference of the United States -- March 16, 1964."

or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. See Rule 8(f)..."

Federal Rules of Civil Procedure

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

"(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

***

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

Regulations of the Secretary of the Army For Canal Zone Merit System

35 C.F.R. 253.42(c) Probationary period

"An eligible given a Canal Zone career-conditional appointment shall be required to serve a probationary period of 1 year...The employing department shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate

his services during such period if he fails to demonstrate fully his qualifications for continued employment. The employment shall automatically acquire a merit status upon satisfactory completion of probation." (1978 ed.)

35 C.F.R. §253.242 Probationary employees

"Any employee serving a probationary period shall be given a full and fair trial in the duties of the position in which appointed. If the performance of his duties or his conduct during the probationary period is not satisfactory to the employing department, his services may be terminated by notifying him in writing of the reasons for his separation and of its effective date. An employee's services may also be terminated during the probationary period for reasons based in whole or in part on conditions arising prior to his appointment. The employing department shall notify him of the reasons for his separation and its effective date." (1978 ed.)

Federal Procurement Regulations

41 C.F.R. §1-2.304. Modification or withdrawal of bids.

"(a) Bids may be modified or withdrawn by written or telegraphic notice received in the office designated in the invitation for bids not later than the exact time set for opening of bids...

41 C.F.R. §1-2.305 Late modifications and withdrawals

"Modifications of bids and requests for withdrawal of bids which are received in the office designated in the

invitation for bids after the exact time set for opening are "late modifications" and "late withdrawals," respectively. A late modification or late withdrawal shall be subject to the rules and procedures applicable to late bids set forth in § 1-2.303. However, a late modification of the otherwise successful bid shall be opened at any time it is received; and if in the judgment of the contracting officer it makes the terms of the bid more favorable to the Government, it shall be considered. In the case of late modifications and late withdrawals, the notice set forth in § 1-2.303-6 shall be appropriately modified."

41 C.F.R. § 1-2.406 Mistakes in bids

41 C.F.R. § 1-2.406-1 General

"After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this § 1-2.406. Such actions shall be taken prior to award."

41 C.F.R. § 1-2.406-3 Other mistakes disclosed before award

***

"(2) However, if the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended, and if the bid, both as

uncorrected and corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

"(3) A determination may be made permitting the bidder to correct his bid where the bidder requests permission to do so and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. However, if such correction would result in displacing one or more lower acceptable bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

"(4) If the evidence does not warrant a determination under paragraphs (a) (1), (2), or (3) of this section, a determination may be made that a bidder may neither withdraw nor correct his bid."

APPENDIX F

(Typed from longhand original
Plaintiffs' Exhibit 23)

III
16 Feb 1971

To: Record (File PC-71-1)

Subject: Paraiso Raw Water Pump Station

(1) This is to record the fact that there are certain hazards or risks inherent in the continued use of or the proposed expansion of the Paraiso Raw Water Pumping Station.

To wit: (a) Contamination from passing ships discharges or wrechs such as the Sain Yung
(b) Raw sewage contamination from Gamboa & Paraiso effluents
(c) Possible sabotage, toxic or biological, dropped from a passing ship
(d) Possible damage to intake by ship or barge accidents

(2) Precautions can be taken which will eliminate or minimize these risks if other sources of domestic water cannot be feasibly developed. With the abundance of precipitation, it is likely that one such source which is not subject to all of the above hazards is available.

IH Mason

cc: Governor — Engr Div
E & C Director — Civil Br
Designing Engineer — S & E Br

C O P Y

CONFIDENTIAL

23 April 1971

His Excellency the Governor
Canal Zone

Sir:

On 1 April I wrote your office requesting your assistance in correcting an injustice perpetrated by my supervisors in the Engineering Division. Since I have not had the courtesty of a reply, I can only assume that you still have the matter under consideration.

In your deliberation, the obvious question must be "why are these people bent on the removal of Mr. Mason and why do they stoop to such depths of this purpose?" I believe the motivation was born out of the fear that my presence represented a threat to the "status quo" in the Bureau and the Division by their respective heads, Col. Charles Clark and Mr. E. W. Zelnick. Accordingly, these individuals directed the Branch Chief and Assistant Chief to provide some justification for my removal.

The apprehension on the part of the Bureau and Division Chiefs was not without foundation for I have openly questioned the wisdom and/or propriety or prudence of certain policies, practices and deeds within these departments. This temerity on my part could not be countenanced in that it reflected unfavorably upon the competence and integrity of those concerned. Thus, their dastarly removal action was ini-

tiated. As a result of the futile effort to find something of substance, upon which to base their action, they were forced to resort to triviality and slander.

The following is an enumeration:

1. One of the practices that I voiced objections to was that of improperly and falsely accounting for the use of professional manpower. In an apparent effort to conceal the cost of developing and maintaining the computerized (MIS) Management Information System, the Division Chief, Mr. E. W. Zelnick, has specifically directed that professional manpower utilized for this purpose not be reported as such. Even though minute and juvenescent time records of mature and professional personnel are maintained, the effort expended by them in keeping these and numerous other clerical records is falsely reported in other categories. You may verify this allegation by referring to any or all of the estimators in my branch. In the event they be intimidated, I am prepared to produce other witnesses who cannot be intimidated. This is fraudulent and deceitful misappropriation of public funds, which is designed to cover up the imprudent utilization of professional manpower. Either the practice has the tacit, if not express, approval of the Bureau Director, Col. Charles Clark, or he is oblivious to the operations within the Engineering Division.

2. A matter of highly irregular nature within the purview of the Bureau is that of "Livability Improvements to Employee Quarters" as related to certain favored persons. The monetary limitation for

such improvements is established by Company policy. In two instances, of which I am aware, extraordinary practices were utilized with a view to circumvention of this policy. They are:

a. Dwelling of the Assistant Chief of the Dredging Div., in which the Chief of Dredging, Col. Walter Fade, proposed in writing that the Company furnish construction materials only and waive company overhead charges to permit improvements in excess of the limitation.

b. Dwelling of the Engineering & Construction Director, Col. Charles Clark, in which the Director, Col. Clark himself told me not to disclose the Cost Estimate, which exceeded the limitation established by the Governor. He advised me the work would be accomplished by company forces and that the material would be "used" and therefore at no cost. The Pacific Area Facilities Engineer, who was in charge of the performance of the work, advised me the material used was "new" but would be shown as "used." The Chief Architect (who has been terminated within the year probationary period) likewise advised me not to disclose the cost estimate if it exceeded a certain limitation.

Individuals capable of such acts are no doubt capable of likewise covering their tracks and I have no doubt that all parties involved here

have manufactured adequate records to conceal accurate cost accounting. However, it is a matter of record that the initial intent was expressed to myself and others, both in writing and orally.

3. Balboa Road Improvement Contract Serial No. PC-31-3. I vehemently objected to the manner in which this was handled. The low bidder on the contract claimed an error in his bid and requested that an alleged $50,000 omission be added thereto. This occurred on the morning following the bidding and the contractor stated at that time that if the correction were disallowed, he did not desire to withdraw the bid, but would perform the work for the lower amount. Following this, direction was given to my Branch from the Bureau level, to consult with the legal staff and find a precedent in the procurement regulation which would permit award at the higher amount. This was done and the higher amount was used in the contract. Here again, the parties who would commit such acts are no doubt within the strict limits of the law or regulation, but have circumvented the spirit thereof and have exceeded the bounds of ethical conduct for professional engineers, and in addition, have thrown away $50,000 in PUBLIC FUNDS.

4. Sunken ship - The recent sinking of the ship SAIN YUNG posed a threat to the public water quality at the intake on the opposite side of the Canal and the Company expended a sum rumored at approximately $1,000,000 to remove the cargo of the vessel. Since the method used in removing the cargo was to employ the dredge "Mindi," at a tremendous sacrifice in efficiency, the cargo

removal was accompanied by the wasting of vast quantities of water, which was subsequently unavailable for transiting vessels through the Canal. When I questioned him about the excessive cost (in the presence of others) Col. Clark responded in effect that the cost was of no importance in that our government would not be paying the bill.

5. Paraiso Raw Water Intake - The Engineering & Construction Bureau has recently contracted for the expansion and improvement of the Pumping Station at this location which, as mentioned in the previous paragraph, is in the proximity of the sunken ship. I have expressed my opposition to the continued use of this facility (not to mention the improvement thereof) for the following reasons, which are inherent to the location:

a. It is subject to contamination by discharges from passing ships, as well AS FROM WRECKS SUCH AS THE SAIN YUNG. The bacteria count of the raw water showed a marked increase as a result of the sinking.

b. It is subject to contamination by raw sewage effluents from both Gamboa and Paraiso communities.

c. It is subject to possible sabotage by interduction of toxic materials or biological contaminants from a passing ship or smaller vessel.

d. The intake structure and equipment is subject to destruction or damage by the accidental collision by a ship or barge.

Having recently emerged from the business world, I am appalled at the flagrant disregard for the VALUE RECEIVED for each dollar of public funds which is thus dispensed. Taxpayers have the right to demand the proper expenditure of material and manpower resources.

I trust this will assist you in reviewing my appeal and that you will recognize that there was no malfeasance or misconduct on my part - that the only basis for removal action is that of fear on the part of Col. Clark, Mr. E. W. Zelnick, and those they directed to create the libelous and slanderous request for dismissal.

My fear of termination until acquiring Civil Service rights at the end of one year's probation has kept me from reporting these incidents prior to now.

VTY /s/ IRVIN H. MASON

Box 393 - Balboa Hts., C.Z.
CC: Secretary of the Army

PROE

Balboa Heights, C.Z.
Apr. 26, 1971

Mr. Irvin H. Mason, IP-318981
Through: Engineering and Construction
Director, Designing Engineer

Dear Sir:

Your April 1, 1971 letter addressed to the Governor has been referred to me for consideration and reply.

I have reviewed carefully your letter, the request for your removal and your comments thereto. Also, I have considered the Designing Engineer's response to your comments.

It is apparent that it is not in the best interest of this Agency to keep you in the service. Therefore, this constitutes notice that you will be terminated from your position as Supervisory General Engineer (Estimates) in the Engineering Division, as well as from the service of the Panama Canal Company, effective May 1, 1971.

This action is being taken for your failure to qualify during your probationary period. The probationary period is an extension of the examination process for permanent competitive appointment. Under the Canal Zone Merit System an employee who fails to demonstrate required skills or character traits during his probationary period is disqualified for continued employment.

The specific reason for this action, and the facts which support it are as follows:

Unsatisfactory Workmanship

a. It is one of your duties to prepare the Management Information System (MIS) Job Initiation Form for your section. You have passed this work to a subordinate. When questioned about it, you stated that this work should be performed by a secretary. The MIS program is an important manpower utilization and design scheduling tool which among other things, shows the availability of personnel to undertake additional design work. It is necessary for each supervisor to accurately estimate the man-days required to perform each task assigned to his section. You either cannot or will not make such manpower estimates.

b. You do not thoroughly analyze jobs, i.e., study plans and specifications, or sketches, or otherwise become familiar with the project. For instance, when the Coco Solo Hospital project was advertised for bids, November 30, 1970 to January 11, 1971, you neglected to become acquainted with the work and failed to review the estimate prepared by your subordinate. As a result, the Government estimate of a fair and reasonable price to perform the work by contract contained several errors both as to quantities of work and as to judgment of the degree of difficulty of construction. In this particular case, you were unfamiliar with the scope of the work and did not exercise any judgment with respect to the contractor's difficulty of performing the work without interfering with the hospital's operations.

c. One of the supervisory estimator's principal duties is to

review the estimates prepared by his subordinates. During the review of the FY '73 Capital Program (as required in CZAR 79.4), you reviewed the estimates of your subordinate but failed to catch numerous elementary estimating factors such as foundation conditions, utility services, requirements for irregular working hours, etc. Had these errors not been found by others, some items of the 1973 program might have been programmed with serious funds deficiencies.

d. You are reluctant to make estimates and do so only when prodded. You have passed work to others in spite of direct orders from a superior, Mr. Bierman, to do the work yourself.

e. Your work papers are skimpy in detail, resulting in estimates that can only be classified as "rough." They lack professional appearance and content and are a level below the acceptable norm for a Grade 12 position.

f. You are apparently competent to estimate public words (roads, water mains, sewers, etc.) projects. However, you have not displayed any ability to estimate building costs. Lacking an overall knowledge to prepare the varied estimates required in the Engineering Divison, you cannot properly supervise your subordinates and, accordingly, have failed to gain the respect and cooperation of your subordinates.

g. You are not carrying a fair share of the workload and accept direction usually with a joking and facetious comment. You require constant reminding to meet deadlines, particularly in having the preliminary Government esti-

mate ready in order to meet the scheduled advertising dates of Invitations for Bids.

Since you are serving a probationary period, you are not entitled to appeal this action.

Very truly yours,

Edward A. Doolan
Personnel Director

cc:
EC
ECEG PROR FAFR:rkp
PROF

Canon 19. American Bar Association
Canons of Judicial Ethics

"...In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus...avoids the suspicion of arbitrary conclusion..."

***

"But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration and curtail them accordingly, without substantially departing from the principles stated above."